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DE LA

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COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, professeur à la Faculté de Droit de l'Université Laval à Montréal

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TOME VII

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ABRÉVIATIONS.

P. D. T. M. :—*Préris des Décisions des Tribunaux du district de Montréal*, 1854, par T. K. RAMSAY et L. S. MORIN, avocats.

D. T. B. C. :—*Décisions des Tribunaux du Bas-Canada* en 17 volumes, commencées en 1851, par MM. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.

J. :—*Lower Canada Jurist.*

R. J. R. Q. :—*Rapports Judiciaires Revisés de la Province de Québec*, par le Juge MATHIEU.

C. C. :—*Code Civil du Bas-Canada.*

C. M. :—*Code Municipal du Bas-Canada.*

C. P. C. :—*Code de Procédure Civile du Bas-Canada.*

S. R. Q. :—*Statuts Refondus de la Province de Québec.*

S. R. C. :—*Statuts Revisés du Canada.*

C. B. R. :—*Cour du Banc de la Reine* ou *Cour du Banc du Roi.*

C. S. :—*Cour Supérieure du Bas-Canada.*

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RAPPORTS JUDICIAIRES REVISÉS

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CERTIORARI.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram SMITH, J.

Ex parte PRÉFONTAINE for certiorari.

Held: That a *certiorari* in which no proceedings have been had during six months, will be dismissed on motion.

SMITH, J.: This is a motion to quash a *certiorari* for want of proceedings during six months, and a case, Ex parte *Boyer*, has been cited as a precedent. The court adopts the precedent, and the *certiorari* is accordingly quashed. (2 *J.*, p. 202.)

R. and G. LAFLAMME, for Petitioner.

LORANGER and POMINVILLE, for Prosecutor.

PROCEDURE.—EXCEPTION DECLINATOIRE.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram SMITH, J.

ELLIOTT *vs.* BASTIEN et al.

Held: Where an *exception déclinatoire* has been fyled which requires proof to support it, and Plaintiff, instead of inscribing for *enquête* inscribes for hearing, on the merits of the exception, that the exception must be dismissed for want of proof.

SMITH, J.: This is an *exception déclinatoire* fyled by Defendants, alleging that the promissory note sued on was not made at Montreal, but at Vaudreuil. The declaration states that the value for the note was received at Montreal. Plaintiff, instead

of inscribing for *enquête*, inscribes for hearing on the merits of the exception. Under the circumstances, I cannot look at the note, and, there being nothing to support the allegations of the exception, I have no alternative but to dismiss it. Exception dismissed. (2 *J.*, p. 202.)

LOUIS BÉTOURNAY, for Plaintiff.

OUIMET, MORIN, and MARCHAND, for Defendants.

BORNAGE.—PROCEDURE.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram MONDELET (C.), J.

ADAMS *vs.* GRAVEL.

Held: That a material reference in a surveyor's report to a plan not of record in the cause is bad, and sufficiently so to cause the report to be set aside.

MONDELET (C.), J.: This is a motion by Defendant to reject a surveyor's report, on the ground that it makes reference in a material particular to a plan deposited and of record in the office of a notary public. No copy of this plan accompanies the report nor is any evidence of the existence or character of the plan of record in this cause. This is a fatal defect and the report must consequently be set aside. Motion granted. (2 *J.*, p. 203.)

DRUMMOND and DUNLOP, for Plaintiff.

CARTIER and BERTHELOT, for Defendant.

CORPORATION.—SECRETAIRE.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram MONDELET (C.), J.

RYAN et al. *vs.* ROBINSON, and the MONTREAL and CHAMPLAIN RAILROAD COMPANY, Tiers-Saisie.

Held: That a *verbal* acceptance of a draft by the secretary of a corporation and of another draft by the accountant of such corporation is sufficient to prevent the attachment by *saisie-arrêt après jugement* of the money covered by such drafts.

This was a contestation of the declaration of the *Tiers-Saisie*, on the ground that, at the time of the service of the writ of attachment, the Company had in its hands certain monies

belonging to Defendant, in addition to those admitted by the declaration of the *Tiers-Saisie*, and that, notwithstanding the attachment, the Company had paid them away. It was admitted in writing that, when the attachment was served, the Company owed Defendant £36 6s. 9d. for salary; that the secretary of the Company had *verbally* accepted a draft of Defendant, some six months before the attachment, for £25 and that the accountant had likewise *verbally* accepted another draft of Defendant, also before the attachment, for £3 15s. 10d. and that both drafts were paid to the payees thereof by the Company *after* the attachment had been served.

At the hearing, BETHUNE, for Plaintiffs, contended that these *verbal* acceptances by two subordinate officers, of the Company could never bind the Company and were wholly insufficient to prevent Plaintiffs, who were judgment creditors, from attaching the monies covered by the drafts before they were actually paid,

MONDELET (C.), J.: The only party who had any right to complain of the insufficiency of the acceptances was the Company, and, as the Company afterwards paid the drafts, it recognized the validity of the acceptances. I must therefore dismiss the contestation. Contestation dismissed. (2 *J.*, p. 204.)

BETHUNE and DUNKIN, for Plaintiffs,

ROSE and MONK, for Tiers-Saisie.

COMPAGNIE INCORPOREE.—SECRETAIRE.

COURT OF QUEEN'S BENCH, IN APPEAL.

Montreal, 5th December, 1859.

Coram Sir L. H. LAFONTAINE, Bart., C. J., DUVAL, J., MEREDITH, J., GUY, J., *ad hoc.*

RYAN et al. (Plaintiffs in the court below), Appellants, and THE MONTREAL AND CHAMPLAIN R. R. CO. (Tiers-Saisie in the court below), Respondent.

Held: That the secretary and accountant of "The Montreal and Champlain Railroad Company" have no power to accept drafts on behalf of the Company and, consequently, that the moneys covered by such drafts may be legally attached by process of *saisie-arrêt*, notwithstanding such acceptance by such unauthorized officers.

This was an appeal from the judgment rendered by the Superior Court at Montreal, on the 27th day of March, 1858, reported *suprà*, p. 2.

DUVAL, J.: This case will be easily understood by the written admissions signed by the parties, which are in the

following words: " The parties, Plaintiffs " and *Tiers-Saisie*, " respectively admit, that Defendant was a salaried clerk in " the employ of the Company *Tiers-Saisie*; that, at the time of " the service of the writ of attachment in this cause on the " said Company, there was an amount of thirty-six pounds, six " shillings and nine pence of such salary still in the hands of " said Company, but that William A. Merry, the secretary of " said Company, had in his possession the draft for twenty- " five pounds currency hereunto annexed, and which Merry, " as such secretary, had in the month of June last verbally " agreed to pay to the payee thereof, and that the accountant " of the Company had also in his hands the draft for three " pounds fifteen shillings and ten pence currency hereunto " annexed, which the said accountant had also previous to the " service of the said writ verbally agreed should be paid to " the payee thereof. And that after the said attachment was " so served, the Company paid over the amounts of the said " two drafts to the said payees thereof respectively." It will be observed that the admissions say it was verbally agreed. Here lies the whole difficulty. The question is this: could the secretary or accountant, by law, bind the Company by a verbal acceptance or agreement? Such a proposition would be monstrous. Moreover, the mode of binding the Company to pay a note or bill, is specially provided by statute, and the course there pointed out has not been followed in the present case. The judgment of the court below must therefore be reversed.

JUDGMENT: Considering that it appears by the admissions, that Defendant in the court below was a salaried clerk, in the employ of Respondent, *Tiers-Saisie*, in the court below, and, that, at the time of the service of the writ of attachment in this cause on Respondent, there was an amount of £36 6s 9d of Defendant's salary in the hands of Respondent, and that William A. Merry, the secretary of Respondent, had in his possession a draft for twenty-five pounds currency mentioned in the said admissions, and which draft, Merry, as such secretary, had in the month of June prior to the said service of the writ of attachment upon Respondent, verbally agreed to pay to the payee of the said draft; and that the accountant of Respondent had also in his hands the draft for £3 15s 10d also mentioned in the said admissions, which the said accountant had also previous to the service of the said writ, verbally agreed should be paid to the payee thereof, and, that after the said attachment was so served, that Respondent paid over the amounts of the said two drafts to the said payees thereof respectively; and, considering that it does not appear that the said officers of the Company Respondent had any power to accept the said draft on account of the said Company Res-

pondent, and that Company Respondent, after the service of the said writ of attachment was not justifiable in paying over the amounts of the said drafts to the said payees thereof, as aforesaid, and, therefore, that there is error in the judgment of the court below, which gives Respondent credit to the prejudice of Appellants for the amount of the said two drafts so paid as aforesaid; doth, in consequence, reverse and set aside the said judgment. rendered by the Superior Court at Montreal, on the 27th day of March, 1858, and this court, proceeding to render the judgment which the court below ought to have made and rendered in the premises, doth condemn Respondent to pay to Appellants the sum of thirty-six pounds, six shillings and nine pence (4 *J.*, p. 38.)

BETHUNE and DUNKIN, for Appellants."

ROSE and MONK, for Respondent.

BORNAGE.—PRESCRIPTION.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram MONDELET (C.), J.

MACFARLANE *vs.* THAYER.

Held: 1. In an action *en bornage*, that the existence, for upwards of ten years, of a *mur mitoyen*, along a portion of the division line between two properties, and of a fence along the remaining portion of such division line, is no bar to the Plaintiff's right of action.

2. That, where it is established, by the surveyor's report, that the wall and fence encroach on Plaintiffs' property, Defendant must pay the costs of the action, and the costs of the survey be equally borne by both parties.

This was an action *en bornage*, in which Defendant pleaded, that, for upwards of ten years before the institution of the action, Defendant had possessed his property, in good faith, and under a good title, and that, during all that time, there had existed, between Plaintiff's and Defendant's properties, well known and recognized legal boundaries, in the shape of a *mur mitoyen* along a portion of the division line, against which both parties had built their stables, and of a fence along the remaining portion of such division line, and prayed that the action should be dismissed. Plaintiff proved that no legal *bornes* existed establishing the division line between the respective properties, and, on the other hand, Defendant proved the existence, for more than ten years, of the *mur mitoyen* and fence referred to in his plea, and that both parties had equally contributed towards the cost of the erection of the

wall and built their stables against it; Plaintiff also proving that, when the wall was being built, he had protested notarially, to the effect, that it was not in the right line. The case was then inscribed for hearing on the merits.

At the hearing, BETHUNE, for Plaintiff, contended, that the action *en bornage* was imprescriptible (1), and that fences and walls existing between properties, as in the present case, served merely to indicate what is termed, in legal phraseology, a *délimitation* between the properties, and could in no degree determine the legitimate bounds of each property, or answer the requirements of a *borne* properly so called (2).

On the 27th of June, 1857, the Court, composed of Justices SMITH, MONDELET (C.) and CHABOT, rendered the following judgment: " La cour, attendu qu'il appert qu'il n'y a jamais eu de bornes et lignes légalement tirées et fixées entre les terrains contigus des parties; attendu que la possession invoquée par le Défendeur n'est pas en loi une fin de non-recevoir à l'action du Demandeur; attendu qu'il résulte de la preuve qu'un mur a été érigé près des limites respectives des dits terrains, lequel mur a été considéré depuis longtemps par les parties comme mur mitoyen et a servi comme tel; ordonne, que par arpenteur juré, les dits terrains des parties seront mesurés, chaînés et arpentés, en présence des parties ou elles dûment appelées. Et le dit arpenteur dressera procès-verbal et plan figuratif des lieux, indiquant qu'elle est et doit être la ligne de séparation et division des dits terrains, d'après les titres des parties, et la vraie position et assiette du mur mitoyen et sa longueur, dont et du tout le dit arpenteur fera rapport.

On the 17th of October, 1857, the surveyor fyled a report, with a plan, by which it was established that the wall and fence were both on Plaintiff's side of the true line of division between the properties in question. On the 28th of November, 1857, the Court, composed of DAY, J., homologated the report, and ordered *bornes* to be planted, according to the report, and a new report and plan to be fyled shewing the actual position of the division line, and *bornes* as actually planted. The *bornes* were, thereupon, planted, and a report and plan fyled as ordered, and, on the 27th of March, 1858, they were duly homologated and confirmed, and final judgment rendered in the premises declaring that the line, as established by the surveyor and indicated on his plan, should forever stand as the line of division between the two properties, and condem-

(1) 3 Toullier, n° 170.

(2) Curasson, *Des actions possessoires*, *verbo* Bornage, p. 430; Dévoyau & Watson, 5 R. J. R. Q,. p. 204.

ning Defendant to pay the costs of the survey to be borne equally by Plaintiff and Defendant. (2 *J.*, p. 205.)

BETHUNE and DUNKIN, for Plaintiff.

S. W. DORMAN, for Defendant.

FEMME MARIEE.—OBLIGATION.

SUPERIOR COURT, Montreal, 30th April, 1858.

Coram SMITH, J.

MERCILLE *vs.* FOURNIER et vir.

Held: In an action on two notarial obligations, signed by a wife *séparée de biens*, in which she acknowledges herself personally indebted to Plaintiff, that it is competent for her to plead, and prove, by verbal testimony, that the statement of personal indebtedness contained in the obligations is false, and that, on the contrary, it was the husband who was really indebted, and that she was merely his security, on the ground that such contracts are in fraud of the law of the land (1).

This was an action on two notarial obligations, signed by the female Defendant, duly authorized and assisted by her husband, in which she, *séparée de biens* from her husband, acknowledges herself personally indebted in certain sums of money to Plaintiff. The wife pleaded that the allegation of personal indebtedness on her part, contained in the deed, was untrue, that, on the contrary, it was the husband who was the party really indebted to Plaintiff, and that she signed the deeds, at the instance of Plaintiff and the solicitation of her husband, for the mere purpose of securing the debt so due by her husband. Plaintiff was examined on *faits et articles*, and at *enquête* Defendant tendered verbal testimony in support of her plea, on the ground that there was a *commencement de preuve par écrit* in the answers of Plaintiff sufficient to allow of the adduction of such verbal testimony, and that, at all events, inasmuch as the allegations set forth in the plea imported a fraud and violation of the registry ordinance, 4th Vic., ch. 30, she was entitled to establish such fraud by parol evidence. DAY, J., who presided at the *enquête*, refused to admit the evidence, and, at the final hearing, a motion was made to revise his ruling.

SMITH, J.: I am against Defendant's pretension that the answers on *faits et articles* afford a *commencement de preuve par écrit*, but I am with Defendant on the question of adducing verbal evidence to prove the fraud set up in her plea. The defence in this case rests entirely on motives of public

(1) V. art. 1301 C. C.

policy. The law declares that all contracts entered into by the wife, as surety in any way for the debts of her husband, are absolutely null and void. Any contract, therefore, which she may so attempt to make, although disguised under a different name and made to appear as an obligation for an individual debt of her own, is in fraud and violation of the law, and it is competent, in my opinion, for the party pleading such fraud to prove it by parol testimony. The law was plainly made to protect the wife, and it would be a contradiction to say, that its enactment could be defeated by the rule of the French law which excludes verbal testimony *outre le contenu d'un acte*. I am under the necessity, consequently, of reversing the decision of my brother DAY, and of sending the parties back to *enquête*.

" THE COURT : Considering that Edesse Fournier is entitled " by law to prove the allegations in her said plea set forth, by " verbal testimony, as the matter and things alleged and set " forth in her said plea, import a fraud and violation of the " 4 Vic., ch. 30, which, in express terms, declares such contracts " to be absolutely null and void, and, considering that, in " such cases, as in all cases of fraud, either of the law or of " the parties complaining of the fraud, verbal testimony is " by law admissible ; the court doth grant the motion of the " Defendant Edesse Fournier, and doth overrule and set aside " the objection maintained at enquête by the presiding judge, " and doth order that the said cause be discharged from the " *rôle de droit* for hearing on the merits of the said cause, " and doth order the said cause back to the *rôle d'enquête* to " enable Edesse Fournier to proceed to the proof of the " allegations in her said plea." (2 *J.*, p. 205, et 9 *D. T. B. C.*, p. 300.)

L. BÉTOURNAY, for Plaintiff.

J. PAPIN, Counsel.

F. P. POMINVILLE, for Defendant.

H. STUART, Counsel.

FEMME MARIEE.—OBLIGATION.—PREUVE.

COURT ON QUEEN'S BENCH, IN APPEAL.

Montreal, 7th June 1859.

Coram Sir L. H. LAFONTAINE, Bart. C. J., AYLWIN, J., DUVAL, J., MEREDITH, J.

MERCILLE (Plaintiff in the court below), Appellant, and FOURNIER *et vir* (Defendants in the court below), Respondents.

Held: In an action on two notarial obligations signed by a wife *séparée de biens* in which she acknowledges herself personally indebted to the Plaintiff, that it is competent for her to plead, and prove by verbal testimony, that the statement of personal indebtedness contained in the obligation is false, and that on the contrary, it was the husband who was really indebted and that she was merely his security, on the ground that such contracts are in fraud of the law of the land. (1)

This was an appeal from the Judgment of the Superior Court, rendered at Montreal on the 30th April, 1858, and reported *suprà*, p. 7.

The Judgment of the court below was confirmed, M. Justice Duval dissenting.

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef : Je concours dans le jugement rendu par l'hon. juge Smith, excepté cependant quant à la première obligation, en autant qu'il appert que l'Intimé a véritablement reçu la valeur y mentionnée, et qu'avec les deniers fournis par l'Appelant elle a été acquittée de dettes qui lui étaient personnelles.

DUVAL, Juge : Je ne puis concourir dans le jugement de la cour. Il est établi que, par rapport à la première obligation, il y a mauvaise foi de la part de l'Intimé qui conteste aussi bien cette obligation que la seconde ; on n'a pas raison de croire que sa contestation de cette dernière soit mieux fondée que celle de la première, et sous ces circonstances, je ne puis consentir à rouvrir une enquête qui très probablement n'aura aucun résultat.

AYLWIN, Juge : Il sagit ici d'une disposition de la loi du pays qui est d'une grande importance. L'ordonnance de la 4e Vic., ch. 30, en voulant assurer les acquéreurs de biens-fonds, a pourvu aux moyens de les garantir contre les réclamations des femmes. Presque tous les droits de celles-ci peuvent être mis au néant ; la seule protection qui leur soit accordée est celle qui résulte de la 36e clause de l'ordonnance qui défend à " aucune femme mariée de devenir caution ou responsable, ou " d'encourir aucune responsabilité quelconque, en aucune

(1) V. Art. 1301 C. C.

" autre qualité, ou autrement, que comme commune en biens " avec son mari, pour les dettes, engagements ou obligations " qui pourront avoir été contractés ou faits par son mari avant " leur mariage.... ou en aucun temps pendant la durée de " tout tel mariage." Cette loi est une loi d'ordre public. Toute tentative d'évader une semblable loi, est une fraude, et ouvre la porte à la preuve orale pour l'établir, autrement il serait inutile pour le législateur de faire semblables lois, s'il suffisait, pour l'éluder, que la fraude fut couverte par un acte notarié. Il y a dans la cause des indices suffisants pour permettre à l'Intimée de procéder à son enquête, ainsi l'achat de bois fait par le mari et que l'Appelant prétend avoir été fait pour l'Intimée. Cependant, en portant son action, il est loin de reconnaître ce fait ; car il décrit le mari comme " marchand de bois," et ne donne aucune qualité de commerçant à l'Intimée. Est-il possible de supposer que l'Intimée a pu acheter, pour son propre usage, en une seule fois, la quantité d'environ 800 cordes de bois ? N'est-il pas plus probable que ce bois a été acheté pour le commerce du mari ? Pourquoi, sous ces circonstances, refuser à l'Intimée l'occasion de prouver que véritablement l'Appelant n'avait que le mari pour débiteur ? Au reste, c'est à elle que la preuve incombe, et le Demandeur ne peut en souffrir, surtout, si elle ne prouve pas qu'elle a été lésée en consentant les obligations en question.

MEREDITH, J.: I am of opinion that the Judgment of the court below in this case ought to be confirmed. The registry ordinance expressly declares " that it shall not be lawful for " any married woman to become security or responsible or " incur any liability whatever, in any other capacity or otherwise, than as *commune en biens* with her husband, for the " debts, contracts or obligations, which may have been contracted or entered into by her husband, &c., also " that all suretyships, contracts and obligations made or entered into by " any married woman * * in violation of this enactement shall " be absolutely null and void to all intents and purposes whatsoever ;" now, it would be most unreasonable to hold that parties wishing to violate this important provision of law, which was evidently framed from motives of public policy, could do so safely and effectually, simply by having their illegal conventions executed in the shape of a notarial instrument. This subject is discussed at some length by Chardon (vol. 2, p. 45), and the opinion of that author is " que tous genres de " preuves conséquemment celles vocales sont admissibles.... quand il s'agit de la violation frauduleuse d'une prohibition " d'ordre public." (1) The general rule of the English law,

(1) See also same author, Chardon, vol. 2, p. 53, n° 22.

as every one is aware, is that "parol contemporaneous "evidence is inadmissible to contradict or vary the terms of a "valid written instrument." (1) But that rule is not deemed to be violated by the admitting of parol evidence showing that the instrument is altogether void by reason of the "*illegality of the subject matter*" (2) and, according English law, parol "evidence may be offered to show that the contract was "made for the *furtherance of objects forbidden by law*," (3) I am also of opinion that, in this case, parol evidence may be adduced to prove the fraud of which Defendant complains; although I am not prepared to adopt without reserve the *considérant* of the Judgment of the court below in this respect. According to that judgment, verbal evidence is admissible "in all cases of fraud, either of the law or of the parties com-"plaining of the fraud." The line of demarcation between those cases of fraud in which verbal evidence is admissible, and those in which it should be excluded, seems to me to be clearly and accurately drawn by Chardon: "Les diverses "manières dont le dol influe sur les relations d'intérêt entre les "personnes se réduisent à deux principales: l'une consiste en "moyens secrets, qui, *dans le moment même* du traité, "trompent celui qui doit en être la dupe; l'autre n'a rien de "mystérieux *à l'instant* où *se forme la convention*, et se "borne à des promesses qui ne trompent celui qui s'en contente "que lorsqu'il en réclame l'exécution;" Chardon, vol. 2, p. 158, and, at page 162, the same author continues thus: "Ainsi, "lorsqu'une partie argue de dol une convention, on doit exa-"miner s'il a été en son pouvoir, lors du traité, de se prémunir "contre ce dol; si elle a pu le prévoir et demander la preuve "écrite des promesses qu'elle articule, la preuve vocale doit "lui être refusée.... si les faits au contraire tendent à prou-"ver qu'un des contractants a été induit en erreur lors de la "négociation du traité, et n'y a consenti que par suite de sa "déception, on lui doit de l'admettre à le prouver par té-"moins. (4)

The above reasoning suffices to show that fraud cannot in all cases be proved by parol evidence; but I nevertheless think that, even according to the principles laid down by Chardon, parol evidence ought not to be excluded in the present case, because Defendant Edesse Fournier, in executing

(1) Greenleaf, vol. 1, n° 275.

(2) Greenleaf, 1 vol., n° 548.

(3) Same vol. and n° and see numerous cases cited there.

(4) See also Nouveau Denisart, vol. 9, p. 71; Pothier, *Obligations*, n° 799; *Story Eq. Jur.*, vol. 1, p. 171, n° 154.
See also Merlin, verbo *Preuve*, vol. 24, p. 450, col. 1, sect. 2, s. 3, art. 1.

the obligations in question must be presumed to have acted under the influence of her husband, the other Defendant, and, therefore, is not to be deemed blamable, and ought not to be allowed to suffer, for any untrue statement that may be made in the obligations respecting the consideration for which they were given.

For these reasons, I think that the Judgment of the court below admitting parol evidence must be confirmed. Judgment of the court below confirmed (4 *J.*, p. 51, et 9 *D. T. B. C.*, p. 300.)

L. BÉTOURNAY, for Appellant.

J. PAPIN, Counsel.

F. P. POMINVILLE, for Respondent.

H. STUART, Counsel.

FRAUDE.—DECHEANCE.

SUPERIOUR COURT, Montreal, 30th April, 1858.

Coram MONDELET (C.), J.

PICAULT *vs.* DEMERS.

Held: In an action *en rescision* of a deed of sale, on account of *dol*, where Defendant pleads prescription of ten years, that an answer to the effect that the *dol* was only discovered within the ten years, is good in law. (1)

This was a hearing on law, on the issue raised by Defendant's demurrer to Plaintiff's special answer to Defendant's plea. The action was one *en rescision* of a deed of sale, on the ground of *dol*, and Defendant, pleaded the prescription of ten years, and Plaintiff replied specially that the *dol* was only discovered within the ten years. To this answer Defendant demurred, on the ground that the discovery of the *dol* in no way interrupted the prescription pleaded.

MONDELET (C.), J.: I am against the party demurring, and consider that the discovery of the *dol* within the 10 years can be legally pleaded in answer to plea of prescription. Demurrer dismissed. (2 *J.*, p. 207.)

J. R. FLEMING, for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

(1) V. art. 1040 C. C.

EXPERTISE.

SUPERIOR COURT, Montreal, 30th April, 1858.

Coram SMITH, J.

GARDNER *vs.* McDONALD.

Held: That the costs of *expertise* are in the discretion of the, and that, in the exercise of such discretion, the court will, at least, divide them between the parties, where the report has the effect of materially reducing Plaintiff's demand. (1)

This was an action *in assumpsit* for £37, for work and labour and materials. An *expertise* having been ordered, the result was that Plaintiff's claim was reduced to about £3.

SMITH, J.: As a general rule, the costs of *expertise* are in the discretion of the court, and, as Plaintiff's demand has been so materially reduced, I have no hesitation in ordering that costs shall be borne equally by Plaintiff and Defendant.

A judgment similar in principle was rendered by the same judge, on the same day, n° 1535, *Beautrom* vs. *Holmes*. In this case there was no diminution, and, consequently Defendant was condemned to pay full costs. And, on the 30th of June, 1858, in the case n° 220, *Munro* vs. *The Bank of Montreal*, the same judge ordered the costs of expertise to be divided, as Plaintiff was awarded some £600 less than he demanded. Costs of *expertise* divided. (2 *J.*, p. 208.)

M. DOHERTY, for Plaintiff.

C. R. BEDWELL, for Defendant.

MORT CIVILE.

SUPERIOR COURT, Montreal, 30th April, 1858.

Coram BADGLEY, J.

ROWELL *vs.* DARAH.

Held: That a person confined in a penitentiary, under a conviction for forgery, is not *mortuus civiliter*, and that a signification of a transfer during that period on his wife is valid. (2)

This was an action to recover a debt due by Darah to Stephen S. Phelps, and by him transferred to Plaintiff. The transfer was signified on Defendant's wife, whilst he was confined in the provincial penitentiary, under a conviction for forgery.

(1) V. art. 478 C. P. C.

(2) V. art. 31 C. C.

Defendant pleaded that, at the date of the transfer, the debt affected to be assigned by it was compensated and extinguished, by reason of certain debts then legitimately due by Phelps to Defendant, and moreover, that the signification on his wife was of no avail, he being at the time civilly dead, by reason of his being confined in the provincial penitentiary, under a conviction for forgery.

BADGLEY, J. : The fact of Defendant being confined in the penitentiary for forgery did not make him civilly dead, and I, therefore, consider the signification on the wife to be sufficient ; but, on the other hand, I think the plea of compensation tion has been made out, and I must consequently dismiss the action. (2 *J.*, p. 208.)

A. and G. ROBERTSON, for Plaintiff.

CROSS and BANCROFT, for Defendant.

DESISTEMENT.—PROCEDURE.

SUPERIOR COURT, Montreal, 30th April, 1858.

Coram MONDELET (C.), J.

CLARKE et al. *vs.* CLARKE et ux.

Held : That it is not competent for the parties to a suit to desist from a judgment dismissing a pleading, and obtain a re-adjudication of the court in regard thereto.

This was a hearing on law, on the issue raised by Plaintiff's demurrer, to a preliminary plea fyled by Defendant, the nature of which is explained in the report published at page 99 of the 1st vol. of the *Jurist*. It would appear that, on the 19th of May, 1857, the demurrer had been maintained, and the plea dismissed, in consequence of the accidental absence from court of Defendant's counsel when the cause was called, and, on the 17th of June, 1857, the parties fyled a written *désistement* from that judgment, and the cause was subsequently re-inscribed for hearing on the demurrer.

MONDELET (C.), J. : The court is of opinion that, as judgment has been once solemnly rendered on the point now attempted to be re-submitted, there is an end of the matter, and the inscription is consequently discharged. (2 *J.*, p. 209.)

A. and G. ROBERTSON, for Plaintiffs.

DAVID and RAMSAY, for Defendants.

PRIVILEGE.—JUDGMENT CREDITOR AND VENDOR.

SUPERIOR COURT, Montreal, 28th June, 1858.

Coram BADGLEY, J.

LEMESURIER et al. *vs.* MCCAW, and DOLAN, Opposant, and Plaintiffs' Opposants contesting Opposition of DOLAN.

Held: That the vendor's privilege of *bailleur de fonds* is postponed to that of the judgment creditor whose judgment was registered before the deed of the vendor. (1)

By report of distribution the Opposant Dolan was collocated as *bailleur de fonds* for the proceeds of the sheriff's sale of a lot of land, which had been originally sold by Dolan to Defendant, by deed dated 8th July, 1853, and which deed was registered on the 18th December, 1853.

Plaintiffs, who had fyled an opposition claiming to be collocated for their claim, according to priority of their *hypothèque*, created by enregistration of their judgment, on the 9th December, 1853, contested Dolan's collocation, on the ground that, inasmuch as he had omitted to cause his deed to be registered within 30 days from its date, in conformity to the statute 16 Vic., cap. 206, sec. 5, his privilege of *bailleur de fonds* had been lost, and Plaintiffs were entitled to the amount of the collocation by priority of *hypothèque*. Opposant contended that the certificate of enregistration written upon the copy of judgment produced by Plaintiffs, was defective; it is conceived in these terms: I certify that this document was " entered at the hour of nine of the ninth day of December, " one thousand eight hundred and fifty-three, and registered " under No twenty-four hundred and eleven, on pages 221 " and 222 of Register B., vol. fifth of registers for the county " of Drummond. Signed, R. MILLAR, D. Regr."

BADGLEY, J., pronounced judgment in favor of Plaintiffs, maintaining their contestation, and ordering that the Report of distribution be reformed, according to the conclusions of the contestation. " Considering that the judgment obtained by Plaintiffs and contesting Opposants, rendered on the 5th day of December, 1853, was duly registered on the 9th day of the said month of December, and that the deed of sale by Opposant Dolan to Defendant, of the lots of land and premises sold and whereby he claims to be collocated for the proceeds of said lots of land and premises as *bailleur de fonds* thereon, was dated on the 8th day of July, 1853, and was registered on the 18th December, 1853, whereby full and

(1) V. art. 2098 et 2100 C. C.

valid prior effect was given to the enregistration of said judgment, in preference to the claims of Opposant, doth order, etc. Contestation maintained. (2 *J.*, p. 219.)

ROSE and MONK, for Plaintiffs and Contestants.

LEBLANC and CASSIDY, for Opposant Dolan.

LOUAGE.

SUPERIOR COURT, Montreal, 30th April, 1858.

Coram BADGLEY, J.

VANNIER et ux. *vs.* LARCHE dit LARCHEVÊQUE.

Held: That a proprietor is not responsible for damages caused to a neighbouring proprietor by explosions in quarrying carried on his property by his tenant. (1)

This was an action of damages alleged to have been caused partly by obstructions placed on Plaintiffs' land by Defendant and his agents, and partly by explosions in quarrying on Defendant's property adjoining. The plea amounted to the general issue.

BADGLEY, J.: The only part of Plaintiffs' demand which is at all made out is that arising from the explosions on Defendant's property, but it is in evidence that these explosions were not caused by Defendant, but by his tenant. Now, even if real damage were proved Defendant is clearly not liable, and although these explosions have been of course very annoying to Plaintiffs, it has not been satisfactorily established that any damage was really caused by them. The action must therefore be dismissed.

JUDGMENT: " Considering that Plaintiffs have not established the material averments of their declaration, and that, at the time of the commission of the several acts in Plaintiffs' declaration complained, Defendant was not in possession and occupation of said lot of land and premises in Plaintiffs' declaration alleged to be in his possession, and that the same, together with the quarry thereon, were in the possession of Louis Limoges, as tenant of the same, who worked, *exploité*, the same for his own advantage ; and considering that the said acts complained of were so done by Limoges without any participation therein by Defendant. Action dismissed. (2 *J.*, p. 220.)

PELLETIER and BÉLANGER, for Plaintiffs.

S. DEBLEURY, for Defendant.

(1) V. art. 1054 C. C.

PROCEDURE.—PEREMPTION D'INSTANCE.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram SMITH, J.

PECK et al. *vs.* MURPHY et al., and THE MAYOR, ALDERMEN and CITIZENS OF THE CITY OF MONTREAL, Tiers-Saisis.

Held : That a motion, praying that action be dismissed for want of proceedings during three years, and not asking that case be declared *périmé*, is irregular and will be rejected.

SMITH, J. : This is a motion by the *Tiers-Saisis* for *péremption d'instance* as regards the *saisie-arrêt* ; but, instead of asking that action be declared *périmée*, it asks that the action be dismissed. This is irregular and the application must therefore be rejected. Motion rejected. (2 *J.*, p. 221.)

A. CROSS, for Plaintiffs.

J. F. PELLETIER, for the Tiers-Saisis.

PROCEDURE.—PLAIDOYER.

COUR SUPÉRIEURE, Montréal, 22 avril 1850.

Coram DAY, SMITH and WANFELSON, Justices.

MACFARLANE *vs.* SCRIVER.

Jugé: Qu'un plaidoyer ne doit pas être dans la forme hypothétique.

In this case, the action was directed against Defendant, as having been *commune en biens* with her husband deceased. She pleaded that her marriage with him took place in the United States, and, therefore, that she was not *commune en biens* with him ; but, if she was so, then she had renounced to the community. Plaintiff demurred to this plea as being hypothetical, and the court maintained the demurrer and dismissed the plea. (2 *J.*, p. 250.)

PUBLIC OFFICER.—RESPONSIBILITY.

SUPERIOR COURT, Montreal, 27th February, 1858.

Coram BADGLEY, J.

RAMSAY *vs.* JUDAH et al.

Held: That money paid into bank by receiver general to credit of seigniorial commissioners and upon which they can draw their checks for a certain purpose, payable to the order of the lawful recipient, is not money in their hands for which they can be sued.

This was an action brought against the seigniorial Commissioners, for the amount of a half year's approximate revenue, as indemnity for the suppression of *lods et ventes*. The declaration set up that Plaintiff was a seignior in Lower Canada, and that Defendants were the seigniorial commissioners appointed under the seigniorial act of 1854 and the acts amending the same ; that Plaintiff had given in his approximate statement, as required by law, which Defendants had accepted and had already paid Plaintiff for several terms of this interest; that moreover, Defendants had received the necessary funds from governement to pay the seigniors generally, and particulary Plaintiff, for the term due on the 1st of July 1857, but that in order to annoy Plaintiff, Defendants had maliciously refused to pay this instalment without any just cause or excuse although they had frequently promised to pay Plaintiff. Defendants who severed in their defence met this action by the general issue. The evidence established the facts that Defendants were charged by government with the payment of this interest, and that funds for this purpose were placed in chartered banks, in the city of Montreal, to the credit of two of them (Judah and Dumas), to pay the seigniors in the district of Montreal these instalments, and that said two commissioners were always in funds in this manner to pay such demands, and that they could draw their joint checks for any such payment; that the funds had never been exhausted. It was also proved that Plaintiff's name appeared on the government books as the lawful recipient of the sum sought by him to be recovered, and that it was intended he should be paid. Defendant endeavoured to show that they had no money at their credit for this purpose, and that they could not give checks but only joint drafts to the order of the seignior to be paid. The only witness who did not call them cheques was the secretary of the commission: in the letters of the receiver and deputy receiver general, they received no other name than cheques, and the bank clerks were equally indiscriminating.

RAMSAY, for Plaintiff, contended that the liability sought to be imposed upon two of Defendants, Judah and Dumas, a *désistement* having been entered as to the other two, was not one arising solely from the statute. None of the seigniorial acts imposed upon the commissioners the duty of paying these instalments to the seigniors. The personal liability of the commissioners arose from their having in their hands funds destined to the use of Plaintiff and which they refused to pay over. It was a liability arising from a rule of the common law, and which has equal force in England and in France. *Vide* Greenleaf, *on Evidence*, p. 102; *Larue* vs. *Craw-*

ford et al., 1 *R. J. R. Q.*, p. 177, and authorities there cited, and specially 5 Cochin, p. 763, argument of Mr. Cochin, where the principle of this action is clearly admitted.

JUDAH, Q. C., contended that one commissioner might be liable, but not four ; that the statute said that the receiver general should pay the seignior, and that no such liability was imposed upon the commissioners, they were not government agents.

BADGLEY, J. : This action, originally instituted against the commissioners appointed under the seigniorial tenure acts for establishing the indemnity revenue to be paid to seigniors, subsists, at this stage of the proceedings, only against the two Defendants, commissioners resident in the district of Montreal. It appears that an approximate statement had been made up in their office and furnished to Plaintiff as the guide for his claim to the statute indemnity, and, upon this statement, he received the first half year's amount, by means of a check or draft officially certified by Defendants ; a misunderstanding afterwards occurred between the parties, and, thereupon, Defendants declined the Plaintiff's application for the certificate of next half year's revenue, which he applied for upon the same approximate statement, which remained unimpugned and unobjected to by the parties. Hence this action, which charges the commissioners, with a personal liability to him for the payment of money alleged to be in their possession for that purpose. It is sufficient to observe that the record does not establish the allegation, nor does the law make them the legal distributors of the funds appropriated for the payment of the indemnity, whatever arrangement may have been agreed upon by the government with them for facilitating the payments. The Plaintiff has misconceived his action ; he might probably, by the power of a *mandamus*, overcome any refusal by the commissioners to give him the requisite statement or certificate upon which he might apply to the government for his indemnity revenue, but such is not this case, and his demand being unsupported, must fail ; but it will be without costs. The Defendants, as observed, are public officers, seigniorial commissioners. The misunderstanding which originated the action was between Plaintiff and themselves, by reason of a similar claim to that already certified by them upon the same statement, which was not disputed by any of the parties. At the return of the action the two Defendants, commissioners, being also practising attorneys of this court, entered appearances of record for each other, severed in their defences, with pleas of general issue only, and conducted their defences to judgment, being, at the same time, the commissioners, as Defendants and attor-

neys at law acting professionally for each other, on the record. Under these circumstances, no costs will be allowed upon the dismissal of Plaintiff's action. Action dismissed, without costs. (2 *J.*, p. 251.)

RAMSAY, for Plaintiff.

JUDAH, Q. C., for Defendants.

ENREGISTREMENT.

SUPERIOR COURT, Montreal, 28th February, 1857.

Coram SMITH, J., MONDELET, J., CHABOT, J.

DUNCAN *vs.* WILSON, and MCLENNAN, par reprise, and WILSON, Opposant, and WOOD, Opposant and Contestant.

Held: That an Opposant, on an hypothecary claim, is not bound to allege registration of the *hypothèque* to maintain his privilege as regards chirographary creditors. (1)

The Opposant, Jane Wilson, had claimed from the moneys before the court to be paid the amount of her *hypothèque*, under an obligation before notaries, granted her by the deceased Wilson, on the 25th April, 1855. The Opposant Wood had claimed out of the same moneys to be paid the amount of his chirographary debt. The prothonotary collocated the claim of Wilson by preference. Wood contested the opposition of Wilson, alleging that Jane Wilson had not alleged, by her opposition, that the obligation under which she claimed a hypothecary privilege, had been registered in the county where the land hypothecated was situate, and, for want of this allegation, Jane Wilson could not maintain her preferential claim. This pleading of Wood was demurred to by Wilson, on the ground " qu'elle n'était pas obligée en loi d'alléguer l'inscrip-" tion de l'obligation qu'elle invoque au soutien de sa dite " opposition au bureau des hypothèques, attendu que cet allé-" gué n'était pas nécessaire pour établir son privilège vis-à-vis " des autres Opposants en cette cause, qui sont des créanciers " chirographaires, et que ce privilège ressort de l'obligation " hypothécaire elle-même." The court maintained the demurrer and dismissed the pleading. (2 *J.*, p. 253.)

DOUTRE and DAOUST, for JANE WILSON.

LEBLANC and CASSIDY, for WOOD.

(1) V. art. 2082 et 2083 C. C.

HYPOTHEQUE.—INSOLVABILITE.—FRAUDE.

SUPERIOR COURT, Montreal, 27th June, 1857.

THE SAME COURT AND JUSTICES.

THE SAME PARTIES.

Held: That a *hypothèque* given by an insolvent, in favor of one creditor, confers no privilege in favor of the latter, as regards contemporaneous chirographary creditors.

The Opposant Wood contesting the collocation in favor of Jane Wilson, who claimed a *hypothèque*, alleged and proved, that, at the date of the obligation creating the *hypothèque*, the 25th April, 1855, the debtor Wilson, who created it, was insolvent and unable to pay his debts, which far exceeded his assets, the debt due Wood being among these. The court maintained the contestation in the following words:

"Considering that David R. Wood, in his contestation of the order of distribution of the proceeds of the real estate of John Wilson, now before the court for distribution, of the claim of Jane Wilson, to be collocated for the amount claimed in and by her opposition, by privilege of mortgage in preference to Wood contesting, hath fully established, by legal and sufficient evidence, that, at the time of the execution of the deed of obligation by John Wilson in favor of Jane Wilson, and bearing date the 25th April, 1855, that John Wilson was of *en état de déconfiture*, and that, by reason thereof and by law, John Wilson could not grant, and Jane Wilson could not acquire, any hypothèque in preference to other creditors of John Wilson, so as to prevent his estate from being equally divided and distributed among the creditors of John Wilson; the court doth maintain the contestation of Wood, and doth order and adjudge that the judgment of distribution be reformed and set aside in this that Wood and the other creditors be collocated *au marc la livre*, to the amount of their respective claims on the proceeds to be distributed under the said judgment of distribution." (2 *J.*, p. 253.)

DOUTRE and DAOUST, for Jane Wilson.

LEBLANC and CASSIDY, for Wood.

EMEUTE.—MAGISTRAT.—RESPONSABILITE.

SUPERIOR COURT, Montreal, 31st October, 1857.

Coram DAY, J., SMITH, J., C. MONDELET, J.

STEVENSON *vs.* WILSON.

Held: That a magistrate charged with the preservation of the peace in a city, who causes the millitary to fire upon a person, whereby the latter is wounded, is not liable in an action of damages at the suit of the injured party, if it be made to appear that, though there was no necessity for firing, yet the circumstances were such that a person might have been reasonably mistaken in his judgment as to the necessity for such firing. (1)

Plaintiff sought to recover damages, for injuries suffered by him, in consequence of wounds received from the firing of the troops, on the 9th of June, 1853, on the occasion of a lecture given by one Gavazzi, at Montreal. Plaintiff declared that Defendant was then mayor of Montreal and a justice of the peace; and that, on the 9th of June, 1853, Defendant, acting in his said capacity, called out a body of Her Majesty's troops, then stationed in Montreal, for the alleged purpose of suppressing a riot in the vicinity of Zion Church, and then and there assumed the command and direction of said troops, and ordered and caused them to load their muskets with ball cartridge, secretly, and at a distance from the place of the pretended riot, and out of view of any commotion whatever; and, afterwards, caused them to be marched to, and drawn up near Zion Church, in Radegonde street; and that, while said troops were there, under his direction and control, Defendant, wrongfully, illegally, and needlessly, and, without any provocation or reasonable cause, and without any lawful authority to that effect in him vested, and without giving any legal or sufficient notice or warning to those present of his intentions, ordered said troops to discharge their said muskets towards and in the direction of Plaintiff and divers other persons, then lawfully being in or near said Radegonde street, in the Queen's peace; That, in obedience to Defendant's orders and commands, and, by reason thereof, the troops did, then and there, discharge their loaded muskets towards Plaintiff and divers other parties; and that, Plaintiff was shot and grieviously wounded in the shoulder, and disabled and crippled for the remainder of his life; that, at the time Defendant gave the orders, and, at the time the troops fired as aforesaid, there was no riot, disturbance, or cause whatsoever to warrant Defendant in giving such orders, or to render necessary, excuse, or justify the said

(1) *Vide* S. R. C., ch. 41, sec. 34, et ch. 147, sec. 1.

discharge of musketry; but that Plaintiff was shot and wounas aforesaid, by the wrongful acts, neglect, default, gross carelessness, and culpable conduct of Defendant, for which he was answerable to Plaintiff in damages. Defendant pleaded the general issue.

DORMAN, for Plaintiff, contended, that, the material allegations of Plaintiff's declaration were established by evidence. The troops were called out by the requisition of Defendant, acting as the chief magistrate of the city of Montreal. He assumed the command and direction of them. Before marching to the place of the apprehended riot, they, by his orders, loaded their muskets with ball-cartridge. By his orders, they were drawn up near Zion Church, across Radegonde street, in two divisions, the one facing Beaver Hall, the other McGill street. After they had remained in that position about half an hour, and when the audience who had attended at Gavazzi's lecture were leaving the church and quietly dispersing, and men, women, and children, totally unapprehensive of danger, were passing along the street, in front of the troops, Defendant, taking his position near the lower division, in a hurried and unintelligible manner read the Riot Act, and, immediately, addressing himself to the troops of the lower division, in a loud voice gave the orders: "Fire! in the Queen's name, fire!" Upon this, the soldiers of both divisions discharged their muskets among the people in the street, killing and wounding several persons. By the fire of the lower division, Plaintiff was shot, and dangerously wounded in the shoulder, disabled and crippled for life. It was submitted that there was no riot at the time the troops fired, and no legal cause or justification for the extreme proceedings adopted by the Defendant. All Plaintiff's witnesses concur in saying that there was no riot at the time; that the only disturbance was between the engine-house and the American Church, about two hundred yards from the troops, and out of the range of their fire. Several witnesses who were passing at the time between the engine-house and the troops, say that all was perfectly quiet in their vicinity, and between them and the troops; and all were struck with horror at the unexpected and fatal discharge of the troops. There had undoubtelly been a serious riot near the church, before the arrival of the troops, and about half an hour before they fired, and some of Defendant's witnesses have manifestly confounded this with the state of affairs at the time the troops fired; whilst others, in cross-examination, admit that the only riot they refer to was the disturbance between the engine-house and the American Church. Several of the soldiers who fired, and who are Defendant's witnesses, say there was no riot at the time. Again,

the firing took place in daylight, when Defendant could easily see that there was nothing to call for extreme measures. The whole circumstances showed that he failed to exercise the least degree of prudence. The fact that the whole division of troops was ordered to fire, indiscriminately, upon peaceable and unoffending citizens, showed a reckless disregard of human life, which rendered Defendant deeply culpable. It was contended that Defendant had far exceeded the authority vested in him as a magistrate and conservator of the peace; that he was chargeable with the most culpable imprudence and recklessness, in consequence of which Plaintiff had suffered serious injury and sustained irreparable damage; that Defendant was answerable in damages for injuries caused by his fault, whether through malice, carelessness, imprudence, or ignorance of what, in his position, he ought to know.

LORANGER, for Defendant, contended that, if any order was given at all by Defendant, it was addressed to the officers and not to the soldiers; and that, if the order were given to the officers, and they, in consequence, ordered the soldiers to fire, this state of facts were not covered by the declaration, inasmuch as it was therein alleged that Defendant gave the order directly to the troops, and that they fired in obedience to such order. Again, it was to be remarked that the civil magistrate was not responsible for the firing at all. He came there to preserve the peace, and, when the means derived from the civil force in his hands were exhausted, he directed the military officer to act, after which the whole responsibility rested on the latter. In this case, the state of affairs did justify the civil magistrate in calling out the troops, and in calling on the military officer to use his discretion.

DAY, J.: This is an action of damages for the sum of one thousand pounds, brought against Defendant for having, on the ninth of June, 1853, in his capacity of mayor of the city of Montreal, ordered Her Majesty's troops to fire on a number of the citizens of this city, without any justification for so doing, by which fire Plaintiff received a serious wound from which he will suffer for the rest of his life. The question is one of evidence. To maintain his action it was incumbent on Plaintiff to prove three principal points: 1st. that the order to fire was given by Defendant in his capacity of mayor; 2d. that the firing took place in pursuance of such an order; 3d. that the circumstances did not warrant such an order being given. As to the first and second points, Plaintiff has, in the opinion of the majority of the court, made out his case. As to the third, however, the evidence is very conflicting. It is true that, when calmly reviewing the occurrence, by the light of subsequent information, we are inclined to think that no

serious riot existed at the time the order was given ; but the question was not what was the true state of affairs at the time, but whether a magistrate, acting in exercise of his discretion, at a time of great difficulty, had reasonable grounds for doing what he did. The evidence on both sides has been carefully examined, and the court, after mature deliberation, have come to the conclusion that Defendant cannot be said, in the course which he took, to have acted entirely without cause. On the one hand, many most respectable citizens have been brought up who state positively that there was no riot or tumult going on at the time ; and, on the other, an equal number have been examined who state the very reverse. Two in particular, namely McIver and Sharing, are very strong in their statements. They say that a serious riot was going on, and that pistol-shots were fired in the crowd. The policemen also say there was a riot, and there are several others who depose to the same effect. The evidence no doubt shows that, immediatly before the reading of the Riot Act, a serious riot did take place and the court do not feel justified in saying that the responsibility for the consequences of what followed shortly afterwards must be fastened upon Defendant. He certainly seems to have shown a want of coolness and self-possession, but we must remember that he was placed in a position of much difficulty. He had to choose between the responsibility of allowing the riot to go on, and the responsibility of stopping it by forcible measures which might be the cause of bloodshed. There is a difference of opinion among the witnesses as to whether the course which he adopted was justified by the actual state of affairs. Defendant's position was a most trying one, and the court cannot say that he acted entirely without grounds.

SMITH, J., said the position of the magistrate in this case was one of peculiar difficulty, and he was entitled to claim the protection of the law when acting in the exercise of his discretion. Unless there could be shown an absolute want of discretion on his part as almost to amount to malice, the court would not hold him responsible for the consequences of what occurred. The evidence on this point must be strong and conclusive. But here there was a great contradiction, so that the effect of the evidence on one side was completely neutralized by that on the other. The court could not put aside one portion of it, and look only to the other. They must take the whole record as it came before them, and the conclusion they had come to was that the case was not satisfactorily made out against Defendant.

MONDELET, J.: This was a case of such public importance that he could not leave it pass without saying a few words on the

subject. Before proceeding to the merits of the question, he could not help expressing his opinion that the rioting that took place on the 9th of June was a disgrace to the nineteenth century. Before that occurred, he would not have believed that a single man could have been found in Montreal possessing such brutal and ferocious passions as were exhibited by the men from Griffintown who attacked Zion church on that occasion. It was indeed perfectly disgraceful that men could be found amongst us who should attempt to justify an attack upon a church and congregation assembled therein, merely on the ground that a lecture was being delivered in which views were held distateful to their opinions and prejudices. And, for his part, he considered that all those who concerted measures for defending themselves from such a brutal and cowardly attack were deserving of all praise, and would have been perfectly justified in shooting them down. In considering the present case, then, it must be remembered that the mayor, upon whom devolved the responsibility of keeping the public peace, was placed in a situation of peculiar difficulty, for, as much harm might ensue from not using sufficiently stringent measures as from the use of over stringent. His Honor cited cases which occurred in England and United States, and more particularly the riots in Montreal, in 1849, giving it as his opinion, that, had sufficient firmness been shown upon the latter occasion, the houses of parliament would never have been burnt, nor the representative of Her Majesty pelted with eggs and dirt. The learned president had stated that the court was unanimous in dismissing the action, yet that only a majority were of opinion that the mayor had given the order to fire, and that the soldiers had fired upon such order. Now His Honor had no hesitation in saying that he did not concur in the views of the majority of the court on that portion of the question, and he thought that he should be able to prove conclusively that he was right in the views he held. Indeed he was as perfectly satisfied that the soldiers did not fire from any orders of the mayor as he was of his own existence. All the witnesses for Plaintiff swear that the mayor called out " fire ! fire ! " but, when cross-examined, not one of them actually saw the mayor give the order, that is, saw his lips move, but only heard him. Two soldiers who were examined stated they did not fire from the word " fire," but from the regular military command, which consisted of three separate orders, namely, first " attention," then " ready," and lastly " present," and that it would be morally impossible for a soldier, drilled as they were in the british service, to fire on hearing the word " fire." The officers, however, Col. Hogarth, Capt. Cameron, both swear positively that no such military

command was given by any of the officers. It was to be borne in mind that none of this testimony was impeached in the slightest degree, and, consequently, that it was his duty, both as a judge and a christian, to consider that all the parties were in good faith. How, then, were the seeming contradictions in the evidence to be reconciled ? On looking at the deposition of Widow Parker, whose testimony is unimpeached, we find the whole mystery solved most satisfactorily. She testifies that she saw and heard a man, who was probably a discharged soldier, give the military words of command," attention, ready, present," and that immediately after the soldiers fired. Now there was nothing extraordinary in the fact of the soldiers mistaking the voice as that of their officers, and it would fully account for their having sworn that their officers gave the word of command; at the same time, it would also explain how the officers could swear that they had given no such command. He did not in the smallest degree wish to impugn the good faith of Plaintiff's witnesses, amongst whom were to be found some of our most respectable citizens. But it must be borne in mind, that, at a time of such excitement, nothing was easier than for them to mistake the voice of the mayor, in the same manner as the soldiers had done that of their commanding officer, particularly as none of them actually saw him give the word to fire. Again, as to the question whether the mayor would have been justified in ordering the troops to fire (although the evidence was very conflicting as to whether there was a riot going on at the time or not), the witnesses for the defence, including the military officers and all the police, all swear that a very serious riot was going on at the time, while Plaintiff's witnesses deny the fact altogether. It nevertheless appeared in evidence which was not contradicted, that a large body of men from Griffintown were in the act of coming up by the American Church, at the time the fatal volley was fired, by which Plaintiff was injured, and as the record comes before us, we had nothing whatever to do with the volley that was fired up the bill. Under these circumstances of the case, ought the court to hold the mayor liable, even supposing that there was no rioting going on in his immediate vicinity, merely because, in a moment of intense excitement, he and the other witnesses had not judged quite correctly the position and distance of the rioters ? He thought not. By taking this view of the question and this only, all the witnesses might be considered as having deposed in the greatest good faith at the same time that they were swearing to such manifest contradictions. For the reasons above stated,

he had no hesitation in saying that the action must be dismissed. Action dismissed. (2 *J.*, p. 254.)

DORMAN, for Plaintiff.

LORANGER, T. J. J., for Defendant.

SOCIETE PAR ACTIONS.

SUPERIOR COURT, Montreal, 30th April, 1858,

Coram MONDELET (C.), J.

RYLAND *vs.* OSTELL.

Held: That the irregularities in the nomination or appointment of the directors of a Railway Company, incorporated under a special charter, or in the time of holding its first meeting, will not discharge the liability of the shareholders, under the 14 and 15 Vic., cap. 51, sec. 19.

This was an action brought by the *cessionnaire* of a creditor of the Montreal and Bytown Railway Company, against one of the stockholders of the Company, under the Railway clauses consolidation Act (14 and 15 Vic., cap. 51, sec. 19), for the amount unpaid of his stock. The declaration set out the cause of indebtedness, that judgment had been obtained against the Company by Plaintiff's *cédant*, and that execution had been issued and been returned unsatisfied. Defendant, after admitting that he was a stockholder, and that the Company was incorporated by act of parliament, pleaded that the original meeting of shareholders had been called before a fifth of the stock had been subscribed, as required by law; that the directors named were therefore not directors, and had no right to contract with Plaintiff or his *cédant;* that Defendant had a right to set up this want of consideration, and, moreover, that this premature organization of the Company was done by the directors in fraud of the shareholders; that the fifth part of the stock was not subscribed, because the stock which stood in the name of the Corporation of the City of Montreal had been illegally subscribed for. Plaintiff met these two pleas by demurrers.

RAMSAY, in support, said that, if there was fraud, it was not alleged that Plaintiff or his *cédant* were parties to it, that the cause of indebtedness could not be inquired into by Defendant, that it was *chose jugée* between Plaintiff and the Company, for whose debts Defendant was liable to the amount unpaid of his stock.

ROBERTSON, for Defendant, contended that the whole acts of the directors who had not complied with the requirements of the law were void, and did not bind the Company.

RAMSAY: The cases referred to on the part of Defendant applied solely to corporations created under general acts of incorporation, and the very existence of which depended upon the performance of some condition precedent, which must be fulfilled to the letter.

MONDELET (C.), J., maintained the demurrers, and said that the irregularities invoked by Defendant could not affect the rights of Plaintiff to obtain his judgment against Defendant. (2 *J.*, p. 274.)

T. K. RAMSAY, for Plaintiff.

A. and W. ROBERTSON, for Defendant.

NEWSPAPER.—SUBSCRIPTION.

CIRCUIT COURT, Montreal, 13th April, 1858.

Coram BADGLEY, J.

BRISTOW *vs.* JOHNSTON.

Held: That, in an action for the recovery of amount of subscription to a newspaper, it is sufficient to prove delivery of the paper, without proof of any order for the same, and that a verbal refusal to receive the paper, and notification to the carrier to discontinue it, is not sufficient.

This was an action brought for the recovery of £4 10s., three years subscription to the "Argus" newspaper. The plea set up that Defendant had never ordered the paper, but, on the contrary, had always refused to receive it from the carrier. In evidence, Plaintiff failed to prove the order for the paper, and Defendant fully supported his plea.

DORION, for Plaintiff: It is not necessary to prove the order of the paper, as Defendant must be presumed to have acquiesced by receiving it for so long a period. If he did not wish the paper, he should have notified Plaintiff at his office.

SNOWDON, for Defendant: Plaintiff has no right, in law, to compel Defendant to give such notice. In this instance, however, Plaintiff was notified, through his agent, the carrier, not to leave the paper, which is more than sufficient. Besides, the paper should not have been sent without an order.

BADGLEY, J.: Plaintiff is entitled to recover, for two years and a half subscription although it may seem hard for one to pay for a paper he has not ordered, still it was the duty of Defendant to notify Plaintiff at his office: Judgment for £3 15s. (2 *J.*, p. 275.)

CHERRIER, DORION and DORION, for Plaintiff.

H. L. SNOWDON, for Defendant.

NEWSPAPER.—SUBSCRIPTION.

CIRCUIT COURT, Montreal, 14th May, 1858.

Coram C. MONDELET, J.

PARSONS et al. *vs.* KELLY.

Held: That delivery of a newspaper, at the house of Defendant, is not sufficient to maintain an action for the amount of the subscription to the paper, without proof that Defendant ordered it.

Plaintiffs were proprietors of the *commercial advertiser*, and brought this action against Defendant, to recover from him the sum of $13,33, the amount alleged to be due for two years and seven months subscription to their newspaper. The delivery of the newspaper, at Defendant's residence, to his wife, was proved by the carrier boy, as also the admission of Defendants that he had received the paper, though it came irregularly at times.

PER CURIAM: Inasmuch as the order authorizing Plaintiffs to send the paper to Defendant was not produced, the action must be dismissed, for want of proof. Action dismissed. (2 *J.*, p. 275.)

BROWNE, for Plaintiff.

DEVLIN, for Defendant.

FOLLE ENCHERE.—PROCEDURE.

SUPERIOR COURT, Montreal, 29th May, 1858.

Coram SMITH, J.

HALL *vs.* DOUGLAS and MCDOUGALL, et al., Adjudicataires.

Held: That, where, on the face of the preceedings, the *Adjudicataires* are non-residents in Lower Canada, but have paid the capital of their purchase, a rule for *folle enchère*, founded on a claim for interest on such capital, and served on the "Agent and Attorney at law" of the *adjudicataires*, will not be maintained.

This was a rule for *folle enchère* by Andrew Strang, Opposant, against the *Adjudicataires*, who, on the face of the proceedings, were residents in Upper Canada, and was taken out to secure merely the interest on the purchase money, the capital having been paid. The service was made on the "Agent or Attorney at law," of the *Adjudicataires*.

SMITH, J.: It was contended, at the argument, that, inasmuch as the court allowed a rule for *folle enchère* against an Upper Canadian *Adjudicataire*, on a simple return of a bailiff,

that the purchaser could not be found, in the case of *Guy* vs. *Clarkson and McLane, Adjudicataire* (1 L. C. Jurist, p. 198), that, *à fortiori*, the rule in this case, which was served on the "Agent and Attorney at law," of the parties, should be declared absolute. In my opinion, there is a wide distinction between the two cases. In the case of *Guy* and *Clarkson*, no part of the purchase money was paid, while here the *Adjudicataires*, under the sanction and authority of the court, paid into the hands of the sheriff the full amount of the adjudication. The present rule is not strictly for the recovery of the purchase money, but for a supposed claim for interest thereon, from the date of adjudication to the day on which the capital was paid. The service of the rule on the Agent or Attorney at law is plainly insufficient, and I very much doubt whether such a proceeding as a rule for *folle enchère* can obtain at all in a case like the present. Rule discharged. (2 *J.*, p. 276.)

MACKAY and AUSTIN for Andrew Strang.

CHERRIER, DORION and DORION for Adjudicataires.

PROCEDURE.—SAISIE MOBILIERE.

SUPERIOR COURT, Montreal, 29th May, 1858.

Coram MONDELET (C.), J.

BEAUPRÉ *vs.* MARTEL et MARTEL, Opposant.

Held : That a declaration by bailiff in a *procès-verbal de saisie mobilière*, that he elects his domicile in a particular parish, without specifying in what part of it, is insufficient, and that the *saisie* is consequently null. (1)

That a notice of sale at the foot of a *procès-verbal de saisie*, for a specified day of the month, without mention of the year, is null, although such *procès-verbal* be fully and correctly dated. (2)

This was an opposition *à fin d'annuler* fyled by Defendant to a *saisie mobilière*, on the ground that the *saisie* was null, there being no sufficient election of domicile by the seizing bailiff, and no sufficient notice of sale. The election of domicile in the *procès-verbal* was simply in the parish of St. Roch, and the notice of sale written at the foot of the *procès-verbal*, which was fully and correctly dated, was to the effect that the sale would take place on a particular day in May, without any mention being made of the year

"La Cour, considérant que l'Opposant est bien fondé dans

(1) V. art. 560 C. P. C.

(2) V. art. 571 C. P. C.

sa prétention que la saisie faite en cette cause, est nulle, attendu que l'huissier saisissant n'a pas, dans et par son procès-verbal de saisie, fait une élection de domicile suffisante et au désir de la loi, qui l'exige, à peine de nullité. Considérant, de plus, que l'huissier saisissant n'a pas donné au Défendeur, l'Opposant, avis légal du jour que la vente des effets saisis aurait lieu ; maintient quant à ce, l'opposition de l'Opposant déclare nulle la saisie faite en cette cause, et donne mainlevée d'icelle au dit Opposant." (2 *J.*, p. 266.)

LORANGER, POMINVILLE et LORANGER, for Plaintiff.

LEBLANC et CASSIDY, for Defendant.

LOUAGE DE SERVICE.—PROCEDURE.—AMENDEMENT.

SUPERIOR COURT, Montreal, 29th May, 1858.

Coram MONDELET (C.), J.

HASTIE *vs.* MORLAND.

Held : 1° That a servant refusing to obey a lawful order of his master and discharged in consequence, can only recover wages to date of discharge, notwithstanding proof of previous uniform good conduct.

2° That the clerical error of date in a pleading can be amended at the final hearing. (1)

This was an action by a servant against his master, for wages up to the time of the institution of the action, and beyond the time of his dismissal, on the ground that he was unlawfully dismissed. Defendant pleaded that Plaintiff had refused to obey a lawful order, and tendered him his wages till date of dismissal, with costs to date of fyling plea, and, in consequence of a clerical error of date in the plea, Defendant's counsel moved to amend, at the final hearing, under the 86th section of the Judicature Act of 1849.

At the argument, DEVLIN for Plaintiff, contended, that his client had been proved to have served Defendant during a period of five years, and that his mere refusal to return to work after seven o'clock, on a Saturday evening, was no sufficient cause for his dismissal. And that, as to the motion to amend the plea, the error was known at the time of the *enquête* and ought to have been corrected long since, and not left till the case was down for final hearing.

BETHUNE, for Defendant, contended, on the other hand, that proof of uniform good conduct was no excuse in the present case. If the order to come back to Defendant's store, after

(1) V. art. 320 C. P. C.

seven in the evening, had been proved to be unnecessary, there might have been a show of justice on Plaintiff's side, but it was proved here that, in consequence of an accumulation of work caused by the holidays, at the time of the railway celebration, Plaintiff's services were absolutely required. Then, as to the motion to amend, there could be no doubt that it came strictly within the meaning and intention of the Judicature Act of 1849.

MONDELET (C.), J. : This case is not without some interest, the disobedience of orders being confined to one single occasion, and the previous uniform good conduct of Plaintiff being established beyond doubt. But, I cannot admit the distinction urged by the learned counsel for Plaintiff. I have but one question to deal with, did Plaintiff disobey the lawful order of his master, Defendant, or did he not ? now, not only deed Plaintiff disobey a lawful order given to him, but he was distinctly warned of the consequence. I have no hesitation, therefore, in giving judgment in favor of Defendant, and, as to the motion to amend, it is one of that kind that I should have felt inclined to allow, even without the aid of the act of 1849. Tender declared good, motion to amend granted, and action for excess dismissed. (2 *J.*, p. 277.)

B. DEVLIN, for Plaintiff.

BETHUNE and DUNKIN, for Defendant.

AVEU.—DIVISIBILITE.

SUPERIOR COURT, Montreal, 29th May, 1858.

Before DAY, Justice.

LEFEBVRE dit VILLENEUVE *vs.* THÉTARD de MONTIGNY.

Le Demandeur comme représentant sa femme décédée, fille du Défendeur, porta une action pour recouvrer la valeur de l'usage et occupation d'une terre acquise par la femme du Demandeur. Le Défendeur plaida compensation, alléguant que le prix d'acquisition de la terre en question avait été payé par lui à l'acquit de sa fille, et sur sa réquisition. Le Demandeur répliqua spécialement qu'il avait acquis la terre pour sa fille, et en avait payé le prix d'acquisition, mais non pas sur la réquisition de sa fille ou à son acquit, mais dans le but de mettre à exécution son intention de lui donner dans sa succession future et dans celle de feue sa femme, à peu près autant que lui le Défendeur avait donné à ses autres enfants. Par le contrat d'acquisition, le vendeur reconnut avoir reçu le prix de vente de la fille du Défendeur :

Jugé : 1° Que l'on ne pouvait prouver par témoins que le contrat pour l'acquisition de la propriété avait été fait par le Défendeur, et qu'il en avait payé le prix, quoique le contrat fût en faveur de sa fille ; et que tels témoins ayant été examinés, sauf objection, leurs témoignages devaient être rejetés.

2° Que la réponse spéciale ne pouvait être divisée et prise comme une admission du paiement par le Défendeur du prix d'acquisition, sans avoir égard aux autres parties de la dite réponse où il était allégué que l'acquisition avait été faite, et l'argent payé, pour égaliser la part de sa fille. (1)

This was an action brought by Plaintiff in his own name, and as tutor to a minor daughter, issue of his marriage with Marguerite Olive Thétard de Montigny, his deceased wife, and as executor of her last will and testament, against Defendant, father of the testatrix.

The declaration set up a notarial deed of sale of the 3rd January, 1853, from Grégoire Pilon and his wife, to Plaintiff's wife, *séparée de biens* from her husband, of a piece of land, for the price of 6000 livres, old currency, acknowledged by the deed as received by the vendor from the purchaser, " que les dits vendeurs ont reconnu et confessé avoir eu et " reçu, tant ci-devant que présentement, de la dite acquéreur " dont quittance ;" that Defendant intervened and became a party to this deed, and gave up all his rights in virtue of a lease of the farm to him from Pilon, for five years, from 12th October, 1851, acknowledging that he received back the money paid to the lessee as rent for the whole period, and, after setting forth the death, and the last will of Plaintiff's wife, Plaintiff concluded for the sum of £75, being for the rent, use and occupation of the farm, for the years 1853, '54 and '55, at the rate of £25 per annum. The Defendant pleaded that, at the time of the passing of the deed of sale, Defendant paid the sum of 6000 livres therein mentioned, in discharge (à l'acquit) of Marguerite Thétard de Montigny, at her request and that of Plaintiff; and also paid to the seigniors another sum of 500 livres for *lods et ventes* on the property ; that, at the date of the sale, Defendant, was in possession of the farm in question, under the lease mentioned, at £10 per annum, and possessed it for two years only (1853 and 1854) making in all £20 which had been paid for rent, and compensated by means of the 6000 livres paid as above mentioned. The Defendant also pleaded the same facts as to the payment of the 6000 livres, by a second exception, setting up, however, an express agreement said to have been made at the date of the deed, to the effect that Defendant should keep possession of the farm, and that what he got from it should go in deduction of the 6000 livres.

The Plaintiff filed special answers to the exceptions, denying that the sums mentioned were paid at the request or in discharge of his late wife, and alleged " que le Défendeur " voulait, depuis longtemps, donner à cette dernière autant qu'il

(1) V. art. 1243 C. C.

" avait donné à ses autres filles ou enfants, et que le Défendeur " a, pour ce faire, et dans cette vue, acheté au nom de la dite " Marguerite Thétard de Montigny, la dite terre, dont il a " payé le prix, et les lods et ventes dus sur l'acquisition, non " pas à l'acquit de sa fille, et à sa réquisition, mais bien pour " accomplir ce qu'il désirait et voulait faire pour elle depuis " longtemps, en lui donnant autant ou à peu près autant, qu'il " qu'il avait donné à ses autres filles ou enfants, comme part " et portion dans sa succession future, et celle de feue dame " son épouse."

DAY, Justice : This action is brought to recover £75 as the value of the use and occupation of a farm purchased by Plaintiff's wife, under a notarial deed filed, the farm having been possessed by the Defendant for three years subsequently to the purchase. The Defendant pleads that, by the deed referred to, he bought the land for Plaintiff's deceased wife, Defendant's daughter, and paid for it; and sets up the monies thus paid for the land in compensation of the amount claimed by the action. The Plaintiff replies, " true you paid for the land, but you did so, not in acquittal of your daughter, but from motives of liberality, and from a desire to give her as much as you had given your other daughters in your future succession and that of your late wife." The case turns upon this : has Defendant proved his exception ? By the deed of sale, the purchase money is acknowledged as received from the vendee, Defendant's daughter, and the only other evidence for the defence consists in the testimony of Grégoire Pilon, the vendor of the farm, and François Pilon, his father, taken subject to Plaintiff's objection at *enquête*. These parties state that it was Defendant who made the bargain for the farm and paid for it, getting the deed passed in his daughter's name. This evidence I hold to be illegal and Plaintiff's motion to reject it must be granted. The special answer of Plaintiff was relied on by Defendant as a valid admission that Defendant paid for the land, and he wants to divide that portion of the answer from the other part which says the payment was made as an advance to the daughter, to render her portion or share equal to that of Defendant's other children. Such division cannot be made, the plea says " I paid for the land in discharge of the vendee whom you Plaintiff represent." The Plaintiff admits the fact of payment, but denies that it was made in discharge of his wife, saying it was made to equalize her share as above stated. It was for Defendant to make out the contract set up in his exception, which he has not done, and Plaintiff must have judgment for *three years rent*, which, from the testimony of Plaintiff's witnesss which was confined

to the single point of value, I fix at £12, 10, per annum, making in all £37 10.

JUDGMENT: The Court considering that Plaintiff hath proved the material allegations of his declaration, in so far as is necessary to entitle him to recover the sum of money hereinafter specified, and that Defendant hath failed to establish, by evidence, the allegations in his exception in this cause pleaded, contained, dismissing said exception, doth adjudge aud condemn Defendant to pay and satisfy to Plaintiff, as well in his own name and right as in his said capacities, the sum of £37, 10, for the use and occupation of the land mentioned and described in the declaration in this cause. (9 *D. T. B, C.*, p. 233, et 2 *J.*, p. 279.

CARTIER and BERTHELOT, for Plaintiff.

CHERRIER, DORION and DORION, for Defendant.

INSCRIPTION EN FAUX.—REBELLION A JUSTICE.

SUPERIOR COURT, Montreal, 27th March, 1858.

Coram MONDELET (C.), J.

KEMP *vs.* KEMP.

Held: In the case of a *saisie-exécution*, where a Defendant who was outside his dwelling house, the door of which was locked, and within which were his wife and family who were visible from the outside, and who neglected to open the door on being called by the bailiff to do so, that the statement of such Defendant to the bailiff that he could not open the door, amounted to a refusal to do so. (1)

MONDELET (C.), J.: This is an inscription *en faux* fyled by Defendant to the sheriff's return to a writ of execution, on the ground that Defendant did not refuse to open the door of his dwelling house, in order that the sheriff might seize, as stated in such return. It would appear, by the evidence, that, when the sheriff's bailiff went to seize, he found the door of Defendant's dwelling locked, and Defendant who was outside, pretended he could not open the door, although his wife and family were within, and were not only visible from the outside, but were called on by the bailiff to open the door and neglected to do it. This, in my humble opinion, is equivalent to a refusal by Defendant to open the door, and I, therefore, dismiss the proceedings *en faux*. Inscription *en faux* dismissed. (2 *J.*, p. 279.)

M. MORISON, for Plaintiff.

S. W. DORMAN, for Defendant.

(1) V. art. 569 C. P. C.

REBELLION A JUSTICE.—CONTRAINTE PAR CORPS.—PREUVE.

SUPERIOR COURT, Montreal 30th, April, 1858.

Coram MONDELET (C.), J.

KEMP *vs* KEMP.

Held: That a sheriff's return to a writ of execution, setting forth that Defendant has refused to open the door of his dwelling house, in order that the sheriff might seize, is only *primâ facie* evidence of the fact, and is not sufficient of itself to justify a condemnation for *contrainte.*

MONDELET (C.), J.: This is a rule for *contrainte par corps* against Defendant, for refusing to open the door of his dwelling house, in order that the sheriff might seize, and is based on the sheriff's return to the writ of execution. This is not enough, under the requirements of the ordinance of 1667, and I can only regard the sheriff's return as *primâ facie* evidence of the fact. I am aware that there has been an impression at the Bar for many years, that the sheriff's return was sufficient of itself to justify a judgment of *contrainte*, and I shall, therefore, merely discharge the *délibéré*, and order proof on the rule. (2 *J.*, p. 280.)

M. MORISON, for Plaintiff.

S. W. DORMAN, for Defendant.

REBELLION A JUSTICE.

SUPERIOR COURT, Montreal, 28th June, 1858.

Coram: BADGLEY, J.

KEMP *vs.* KEMP.

Held, in the case of a *saisie-execution* where a Defendant who was outside his dwelling house, neglected to open the door which was locked that such neglect did not amount to *a rébellion de justice.*

This was a rule for *contrainte par corps*, based on the facts disclosed in the two preceding reports.

BADGLEY, J.: I am not satisfied, from the proof adduced in support of the Rule, that Defendant was in a position to open the door of his house. He certainly was not bound to break open the door, and his mere neglect to open it cannot, I think, under the circumstances, be construed into a refusal to open it. I must therefore discharge the rule. (2 *J.*, p. 280.)

M. MORISON, for Plaintiff.

S. W. DORMAN, for Defendant.

AUBERGISTE.—PRIVILEGE.

SUPERIOR COURT, Montreal, 27th February, 1858.

Coram SMITH, J.

NORDHEIMER et al. *vs.* HOGAN et al.

Held: That a hotel-keeper has no lien on a piano brought into the hotel by a permanent boarder, as against the owner of the piano, for the board of the boarder. (1)

This was an action *en saisie-revendication*, by which Plaintiffs sought to recover a piano-forte of the value of £80 which they alleged to be their property, illegally detained by Defendants. (2) Defendants pleaded that the piano was the property of James H. Phillips, of the City of Montreal, who had boarded with Defendants, as hotel-keepers, from the 19th of December, 1856, till the 11th of May, 1857; that Phillips introduced the piano, as part and portion of his personal property and effects into the hotel of Defendants, where it had remained ever since, having been left there by Phillips, who was indebted to Defendants, for board, in the sum of £57 16s. 6d., which he refused and was unable to pay, and that Defendants had no other security for the payment of this sum; and that they had a *lien* and privilege upon the piano. The conclusions were for the dismissal of Plaintiffs' action, or, in the event of the seizure being maintained, that it be adjudged, that, Defendants had a *lien* upon the piano, for the amount of their claim for board.

By a special answer, Plaintiffs denied that the piano was ever the property of Phillips, and alleged that, on the 15th of December, 1856, it was leased to Phillips, for the sum of £1 10s. a month, for five months, payable in advance, of which Defendants were then notified, and that Plaintiffs then delivered the piano to Philips, at Defendants' hotel, where he continued to use it, under his lease, till about the 1st June, 1857, when Defendants illegally obtained and kept possession of it.

DORMAN, for Plaintiffs, submitted: 1st. That hotel-keepers have a privilege upon the effects of travellers (*des passants et pèlerins*) only, and that they have no *lien* or privilege upon property and effects of resident and permanent boarders. 2nd. That in the present case, Defendants were aware and

(1) V. art. 1816*a* C. C.

(2) Authorities, *Coutume de Paris*, art. 175; Troplong, *Privilèges*, p. 312, nos 201 to 205; 2, Bourjon, *Droit commercial*, p. 682; Ferrière, *Grand Coutumier*, on the art. 175.

had notice, before Phillips became their debtor for board, that the piano did not belong to Phillips, but was the property of Plaintiffs, which was alone sufficient to deprive them of the privilege claimed, even had it otherwise existed.

SMITH, J. : Defendants invoke the 175th article of the custom. I do not think it applies to the present case which is that of a permanent boarder, but only to " pèlerins " or transient travellers. The commentators explain the expression " pèlerins " by the expressions " voyageurs " and " passants." It is further to be considered that Defendants had notice that the piano did not belong to the person for whose debt they pretend to hold it. To my mind, the question is a simple one, and I give judgment for Plaintiffs, both as to the proprietorship of the piano, and the damages for detention.

" The court considering that Plaintiffs have established the material allegations of their declaration, and that the " piano " seized was not the property of James H. Phillips but was their property, and by them leased to Phillips, then a boarder in the hotel of Defendants, and considering that Defendants had no lien, by law, upon said " piano " for any amount which may have been due to them by Phillips; doth declare the *saisie-revendication* good and valid; and it is further adjudged, and Defendants are hereby jointly and severally ordered to deliver up said " piano " to Plaintiffs, as the lawful proprietors thereof, within three days after service upon them of the present judgment, and, in default of their so doing, it is considered and adjudged that Defendants do, and they are hereby condemned, jointly and severally, to pay to Plaintiffs the sum of eighty pounds as and for the value of said " piano," and it is further considered and adjudged that Plaintiffs do recover from Defendants, jointly and severally, the sum of nine pounds, as and for damages suffered by Plaintiffs from the act of Defendants in refusing to deliver to them said piano." (2 *J.*, p. 281.)

S. W. DORMAN, for Plaintiffs.

ROSE and MONK, for Defendants.

PROCEDURE.—DELAISSEMENT.

SUPERIOR COURT, Montreal, 28th June, 1858.

Coram DAY, J.

BÉLANGER *vs.* DUROCHER.

Held: That a *délaissement* fyled after the expiration of 15 days from the service ofthe judgment will not be rejected on motion to that end. (1)

DAY, J.: This is a motion by Plaintiff, to reject a *délaissement* fyled after the fifteen days. I doubt whether the *délaissement* is bad even for that reason, but the motion to reject it, is premature and not the right course to raise the point. The Plaintiff must go on with his execution, and test the matter in that way. Motion rejected. (2 *J.*, p. 283.)

PICHÉ and PREVOST, for Plaintiff.

OUIMET, MORIN and MARCHAND, for Defendant.

PROCES PAR JURY.

SUPERIOR COURT, Montreal, 28th June, 1858.

Coram DAY, J.

ABBOTT et al. *vs.* MEIKLEHAM et al.

Held: 1. That an action for damages, by two professional men against three merchants, for breach of contract to buy a railroad, is not susceptible of trial by jury.

2. That so much of the conclusions of Defendants' pleas in such action as pray for such trial by jury will be rejected on motion. (2)

This was a motion by Plaintiffs, to reject the words "and of this they put themselves upon the country," where they occur, at the conclusion of the respective pleas fyled by Defendants, inasmuch as the cause was not susceptible of trial by jury.

DAY, J.: This is plainly not a commercial case, the liability of Defendants being based on an agreement to purchase real estate, and in no way connected with commercial matters. The motion of Plaintiffs must, therefore, be granted. (2 *J.*, p. 283.)

HENRY STUART, for Plaintiffs.

ROSE and MONK, for Defendants.

(1) V. art. 549 et 551 C. P. C.

(2) V. art. 135 et 348 C. P. C.

PROCEDURE.—ENQUETE.

SUPERIOR COURT, Montreal, 30th June, 1858.

Coram Smith, J.

FOSTER et al. *vs.* CHAMBERLAIN et al.

Held: That it is not competent for Plaintiffs to compel Defendants to go on with their *enquête*, in the absence of certain of Plaintiffs' exhibits attached to a *commission rogatoire*, issued by them and not returned. And that Defendants are, under any circumstances, entitled to adduce evidence after the return of the commission.

This was a motion by Defendants to have the *enquête* re-opened, on the ground that, when their *enquête* was closed, it was done under compulsion and in the absence of certain of Plaintiff's exhibits, which were attached to a *commission rogatoire* issued by Plaintiffs and not then returned; such exhibits being material to the issue in the cause, and that the return of the commission was new evidence which they had a right to rebut.

SMITH, J.: At the hearing, Plaintiffs contended that, when they closed their *enquête*, they specially reserved their right to fyle the return of the commission, but I do not think that a sufficient reason to prevent Defendants from adducing evidence after the return of the commission. The fyling of the return is a getting in of new evidence which Defendants are entitled to rebut. And moreover, in the absence of material exhibits, they could not legally be foreclosed. Motion granted (2 *J.*, p. 285.)

CROSS and BANCROFT, for Plaintiffs.

BETHUNE and DUNKIN, for Defendants.

DEPENS.

SUPERIOR COURT, Montreal, 27th September, 1858.

Coram DAY, J.

ROUTH *vs.* DOUGALL.

Held: In an action where judgment is rendered for a larger amount than admitted and tendered by plea, but, where the defence is in the main sustained, that Plaintiff must pay the costs of contestation. (1)

This was an action on a check for £32 9s. 6d. drawn by Defendant, and duly protested for non-payment, and interest

(1) V. art. 478 C. P. C.

from date of protest. The Defendant pleaded that he only owed £7 16s. which he tendered with his plea, but without interest or costs. The court gave judgment for £8,6, but without interest, condemning Defendant to pay costs to the fyling of the plea, and condemning Plaintiff to pay the costs of contestation. On judgment being so pronounced, Plaintiff's counsel contended that, according to law and the practice of the court, he was entitled, under the circumstances, to costs to judgment, and that he ought not to be condemned to pay any costs; but, the court, after consultation with justices SMITH and BADGLEY, declared that the practise had been invariably the other way, and that the Plaintiff must pay the costs of contestation as stated in the judgment. (1) Judgment accordingly. (2 *J.*, p. 286.)

BETHUNE and DUNKIN, for Plaintiff.

ROSE and MONK, for Defendant.

CAUTIONNEMENT POUR FRAIS.

SUPERIOR COURT, Montreal, 28th October, 1858.

Coram MONDELET (C.), J.

BENNING *vs.* THE MONTREAL RUBBER COMPANY, and Young, Opposant, and CORNING et al., contesting collocation of Young.

Held : That an Opposant *à fin de conserver* residing out of the Province, who contests the collocation by privilege of another Opposant *à fin de conserver*, is bound to give security for costs. (2)

MONDELET, J. : A question of considerable importance to the bar arises in this case. It is whether an Opposant, resident out of the Province, who contests the collocation of another Opposant, is bound to give security for costs ? The goods and chattels of Defendants have been sold, under an execution against them by Plaintiffs. Corning, Bento & Co., creditors residing in New York, have made their opposition, and Mr.

(1) *Sed vide* case n° 2418, *MacFarlane* vs. *Rodden et al.*, decided in the Superior Court, at Montreal, on the 28th June, 1854, by Justices DAY, SMITH and MONDELET. In this case, Defendant pleaded that he only owed £379 12s. 5d. instead of £528 3s. 10d. demanded, for which he tendered a confession of judgment with interest and costs, and prayed that, in case Plaintiff contested, he should be condemned to pay the costs of contestation. By the final judgment, Plaintiff was awarded less than the amount so confessed, namely £375 6s. 3d. cy., but, on the ground that such amount had not been tendered, with interest and costs, the Defendant was condemned to pay full costs to judgment.

(2) V. art. 29 C. C.

Young, who is also an Opposant has been collocated on his opposition. This collocation is contested by Corning, Bento & Co., and Young's counsel now move that they should give security for costs. It has been argued with much plausibility that the Opposants, Corning et al., are in the position of Defendants, and as such not bound to give security for costs. By the roman law, Defendant was held to give security for costs; this was never received in France, and there Defendant was not bound to give security; but Corning and Company must make out that they are Defendants, in order to exempt them from giving such security; now, after mature deliberation I cannot come to the conclusion that they are Defendants. The ordinance, 41 Geo. III, ch. 7, sec. 2, provides, in terms, that Opposants are bound to give security for costs; and considering that Opposants are not Defendants, I hold that they fall within its provisions. It was argued that Young having claimed an exclusive privilege, and got collocated for it, to the prejudice of the other Opposants, they were, as regards him, Defendants only, and only Plaintiffs as regards the actual Defendants, named such in the cause, against whom the oppositions were directed as suits, and that the Defendants alone, viz. the Rubber Company, had an interest in demanding security. This is very ingenious reasoning, but not satisfactory to my mind. I must consider that Benning and others are Plaintiffs and the Rubber Company Defendants, and that Corning & Co. are Opposants, and, as such, bound to give security. Another objection was made, that security should have been demanded within a reasonable time after the opposition was made; I hold that Young was only bound to move when his claim came to be prejudiced by the contestation. I, therefore, grant the motion, with costs. (2 *J.*, p. 287.)

A. and W. ROBERTSON, for Young.

CROSS and BANCROFT, for Corning et al.

SAISIE IMMOBILIERE.

SUPERIOR COURT, Montreal, 30th June 1858.

Coram SMITH, J.

SOUPRAS *vs.* BOUDREAU and BOUDREAX, Opposant.

Held: That it is not competent for Defendant, whose lands are under seizure, after a return of *nulla bona*, to oppose the sale of such lands, on the ground that he was possessed of sufficient moveable property to satisfy Plaintiff's judgment. (1)

(1) V. art. 554 C. P. C.

SMITH, J.: This is an opposition by Defendant to the seizure and sale of his lands on the ground that he is possessed of sufficient moveable property to satisfy the judgment. There was a return of *nulla bona* in due form, before the issuing of the writ against lands, and moreover the Defendan does not tender or even indicate the moveables he wishes to have seized. It is impossible to allow such and opposition. Opposition dismissed. (2 *J.*, p. 290).

OUIMET, MARCHAND and MORIN, for Plaintiff.

A. and G. ROBERTSON, for Defendant and Opposant.

PROCEDURE.—PLAIDOYER.

SUPERIOR COURT, Montreal, 18th September, 1858.

Coram BADGLEY, J.

MCGILL *vs.* WELLS.

Held: In a case where a preliminary plea has been fyled and the Plaintiffs has demanded a plea to the merits, under the 72d section of the 20th Vict. ch. 44, that Plaintiff may foreclose the Defendant, after the eighth day from such demand, witdout serving the demand of plea required by the 25th secton of the 12th Victoria, chapter 38. (1)

This was a motion by Defendant to take off the foreclosure recorded against him, and to be permitted to plead to the merits, on the ground that such foreclosure was premature, no demand of plea having been served on him as required by the 12th Victoria, ch. 38, sec. 25.

LAFLAMME (R.), for Defendant contended that the foreclosure contemplated by the 72d section of the Act of 1857 required to be made " in the manner prescribed by the 25th section of the Act of 1849," and, consequently, that, after the expiration of the eight days succeeding the demand of a plea to the merits, a formal demand of such plea should have been made in writing, and Defendant only foreclosed after the expiration of the third judical day after such demand. The legislature never intended, by the 72d section of the Act of 1857 to do anything more than place the parties in the same position as they would have been in had the preliminary plea been disposed of in ordinary course, or, in other words, to say, that, instead of waiting till judgment could be rendered on the preliminary plea, that Plaintiff, by merely declaring on receipt of such plea that he wished for the plea to the merits, should have his case progressed to the same extent (but not more)

(1) V. art. 131 et 137 C. P. C.

that it would have been advanced had such judgment been actually rendered on such preliminary plea.

BADGLEY, J.: I am against Defendant on this motion. I think that the act of 1857, in referring to the manner of foreclosing, under the statute of 1849, has not included the necessity of another formal demand of plea. Motion rejected. (2 *J.*, p. 280.)

F. GRIFFIN, Q. C., for Plaintiff.

LAFLAMME LAFLAMME and BARNARD, for Defendant.

SOCIETE PAR ACTIONS.—TRANSPORT D'ACTIONS.

SUPERIOR COURT, Montreal, 28th June, 1858.

Coram DAY, J.

WEBSTER *vs.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Held: 1. That a shareholder who has transferred his shares as collateral security, cannot bring an action of damages against the Company for refusing to register such transfer during a period of several months, and thereby causing him great pecuniary loss, although such transfer be prepared in the form required by the Company's charter. (1)

2. That, moreover, the allegations that the transferees had offered to surrender such transfer to the Company and had demanded that the Company should transfer the shares on their books, were insufficient to meet the requirements of the Company's charter.

This was a hearing on law on demurrer, fyled by Defendant, to Plaintiff's declaration. Plaintiff's action was brought to recover £3000, for damages alleged to have been caused by the Company Defendant, by reason of their refusal to register two transfers of stock, made by Plaintiff to two of his creditors, as collateral security.

Defendant fyled a *défense au fond en droit*, and the following were the reasons assigned in support thereof: " 1st. because from the allegations of Plaintiff's declaration, it appears, that the right to recover damages, by reason of the alleged refusal of Defendant to transfer the shares referred to, (if any such right exists) is vested in the parties therein named as transferees of the shares, to wit, in the firm of Lemesurier, Routh & Co., and in the city and district Savings Bank, and not in Plaintiff, and, because no demand by Plaintiff on Defendant to transfer said stock is alleged or any legal cause or reason by which Plaintiff can demand damages, or recover the alleged loss referred to by reason of a refusal to comply with

(1) V. art. 1065 C. C.

the alleged demands made by the transferees ; 2° because, by the law regulating the transfers of shares in the said Railway Company, a form of transfer is provided, and it is thereby also provided that a duplicate of the transfer in the form so provided, should be delivered to the directors of the Company, to be fyled and kept for use of the Company, and that an entry thereof should be kept in a book to be kept for that purpose, and because it is not alleged that the transfer of the shares was made in the form provided for, and embodied in said law, or that a duplicate thereof was delivered to the directors. And because the alleged offer to surrender the duplicate by the transferees is not a sufficient compliance with said law, nor could such offer, made by the transferees, avail or be pleaded by Plaintiff; 3° because the right of Plaintiff to recover from Defendant the sums of money referred to, appears to rest upon alleged contracts with the transferees, and upon debts alleged to be due them by Plaintiff, and on alleged transfers to them of said shares as collateral security for said debts, and upon alleged demands and protests in respect of said shares, and refusals by Defendant to comply with their demands, whereas, by law, no such right is or can be, by reason of said allegations, vested in Plaintiff against Defendant, by reason of alleged contracts, debts and transactions between Plaintiff and the transferees to which Defendant is not alleged to have been privy, and because the refusal to comply with the demands of the transferees in transfering said stock, would confer on the transferees a right to a similar action against Defendant on their part for their benefit, but not upon the Plaintiff; 4° because the alleged fall or depreciation in the price or value of said shares, and the alledged incidental loss and damage in Plaintiff's declaration referred to, does not impose upon Defendant any responsibility in law to pay Plaintiff for such alleged diminution in value, damage or loss, inasmuch as Plaintiff appears to have transferred, and was by law obliged to transfer the shares absolutely to the transferees, for value paid, and irrespective of the alleged understandings in Plaintiff's declaration mentioned, and because such pretended fall in the price or value of said stock is not nor can the same be taken or held as recoverable by Plaintiff from Defendant, without allegations showing actual damage suffered by him, by reason of his undertakings as vendor or transferor to the vendees or transferees, and in the quality of vendor or transferor solely, and not from any indirect interest in any surplus remaining over after the application of the shares as collateral security in payment of alleged debts, whereas no such allegations are made or anything set forth to show that Plaintiff was or is so held to said ven-

dees or transferees, or hath suffered and sustained any damage legally recoverable from Defendant; 5th. because Plaintiff seeks to impose liability on Defendant grounded on an alleged interest in the shares in his declaration referred to, not as absolute proprietor thereof or as an actual shareholder in the Company, but, on the contrary, arising from the peculiar nature of the understanding and alleged debts and transfer as collateral security for the said debts, and on alleged demands by said transferees, whereas no such qualified and possible interest in any surplus from the proceeds of said shares can impose such liability on Defendant, or vest in Plaintiff as possessing such interest, any right in law to the said sums of money claimed in this action, and because Plaintiff seeks to recover the money demanded on the ground of such partial interest in the shares, or the proceeds thereof, and by reason of the peculiar contracts aforesaid to which Defendant could not and are not obliged to have been parties; 6th. because it appears, that the alleged transfer of the shares were made to the transferees, and the present action brought by Plaintiff founded upon and with reference to contracts, and with understanding peculiar to the relation of alleged debtors and creditors, and to the discretionary power in the transferees as to the form and mode of realizing said shares, or even of holding them indefinitely, and with power to Plaintiff, on payment of his debts, to resume said stock, and that the transfers originated in and were carried out in consequence of undertakings between said parties. that such transfers should be so made and Plaintiff seeks to render Defendant so liable as proprietor of the shares, and as if the refusal to transfer had been made on his demand as such proprietor, and also as if Plaintiff was liable over and had actually paid the damages which, as such vendor or transferor, he might have been liable to the transferees or vendees from not vesting the said shares fully and absolutely in said vendees or transferees by a registration in their name in Defendant's books, as owners of the shares; 7th. because Plaintiff had not set forth any loss or damage which he can legally claim, or which he can recover from Defendant, by reason of the alleged refusals to transfer the shares, and hath not alleged any loss or damage legally suffered by Plaintiff, from or by reason of or directly and proximately arising out of any default or neglect of Defendant in respect of or towards Plaintiff."

DAY, J.: The points raised by the demurrer are substantially two in number: 1st That Plaintiff had parted with his stock and was not, therefore, in a position to bring the action. 2nd That the directions of the statute, which prescribes the mode of transferring stock, were not complied with. On

the first point, I am clearly against Plaintiff. The only party whom the Grand Trunk Company could recognize was the proprietor of its capital stock. The ownership was indivisible, and the stock could not, by private agreement, be divided in such a way as to be available in part to one person and in part to another. The transferees from the time they became so, were the proper parties to make any claim arising out of the stock they held, and, in case of the Company's refusal to comply with a just demand, they had the power, by *mandamus* or otherwise, of compelling performance. They however did not here take any such steps, but waited, received the registration of the stock and made no demand for damages. There could be no qualified transfer as regarded the Company. The legal right and equitable interest in the stock might, by private agreement, reside in different persons, but only by private arrangement ; as regarded third parties the transfer must be absolute. It was to be remarked that Plaintiff now suing did not apply to the Company, but the transferees, not avowedly representing him, made the application and demand. If Plaintiff took judgment there would be nothing to prevent Defendant from being liable to an action for the same causes from the transferees who would sue as the direct owners of the stock.

On the second point, I would observe, that it did not appear, by the declaration, that Defendant were called upon to do an act which they were in law bound to do. The general railway statute, 14 and 15 Vic., c. 51, sec. 17, prescribed a particular method for effecting transfers of stock, viz., by executing an instrument in writing of a given form, in duplicate, one part to be delivered to the directors, to be fyled and kept for the use of the Company, and an entry thereof to be made in a book, to be kept for that purpose. The declaration did not show the required formalities to have been observed. It alleged that the transferees had demanded of the Company to transfer the shares on their books, and that duplicates of the deeds of transfer were at the same time offered to Defendant. But, where special form were furnished by statute, it behoved parties to allege and prove a strict compliance with them, and this compliance was not sufficiently alleged by Plaintiff's declaration. The precise wording of the statute should have been followed, since that offered the only legal means of making a valid transfer. As a matter of verbal criticism, therefore, I think the declaration defective on the second ground, and, on the whole have no hesitation in maintaining the demurrer and dismissing Plaintiff's action. " Considering, that by virtue of the transfer and assignment by Plaintiff of the shares in the capital stock in the declaration in this cause set forth to " Le-

mesurier, Routh & Co.," and to the "City and District Savings Bank of Montreal," and, by law, he ceased to hold any legal title to or in the said shares of capital stock, as owner thereof, and Defendant cannot by reason of the alleged depreciation in the value of said capital stock, after the date of the said transfer and assignment, or of any other of the causes and matters set forth, be liable to him, Plaintiff, for any damage or sum of money, in manner, and form, as he hath prayed, maintaining the *défense au fonds en droit* firstly pleaded, doth dismiss the action. (2 *J.*, p. 289.)

BETHUNE and DUNKIN, for Plaintiff.

CARTIER and BERTHELOT, for Defendant.

SOCIETE PAR ACTIONS.—TRANSPORT D'ACTIONS.

COURT OF QUEEN'S BENCH, IN APPEAL,

Montreal, 5th March, 1859.

Coram Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MONDELET (C.), J.

ARTHUR C. WEBSTER (Plaintiff in the court below), Appellant, and THE GRAND TRUNK RAILWAY COMPANY OF CANADA (Defendant in the court below), Respondent.

Held: 1. That it is competent for a shareholder, who has transferred his shares as collateral security, to bring an action of damages against the Company, for refusing to register such transfer during a period of several months, and, thereby, causing him great pecuniary loss, although such transfer be prepared in the form of the Company's charter.

2. That, moreover, the allegations that the transferees had offered to surrender such transfer to the Company, and had demanded that the Company should transfer the shares on their books, were sufficient to meet the requirements of the Company's charter.

This was an appeal from the judgment of the Superior Court, as Montreal, rendered on the 28th of June, 1858, and reported suprà, p. 45.

MONDELET (C.), J.: In dissenting from the judgment, remarked that, in the first place, the action should have been brought against the directors and not against the Company, the act complained of as not having been performed being one which the directors and not the Company were bound under the act of parliament to perform; but the most potent reason which influenced him was that no such action as the one brought could lie. This action is brought for infringing a statute compelling the registration of transfers of stock. The transfer here was an absolute one. It is alleged that Webster had certain private understandings with Lemesurier, Routh

& Co., and the savings bank, of which the Company knew nothing. The argument was that the transfer was not absolute, inasmuch as it was not carried out by the Company. The answer, however, is this, the Grand Trunk have nothing to do with that. The *cessionnaires*, or, rather, the absolute proprietors, might have sued the Company or compelled them by *mandamus* to register the transfer, but there can be no action on the part of Webster against the Company. The *défense en droit* is fyled on the very ground that there is no action at all in Webster, and I am decidedly of that opinion. In England they have the general demurrer which answers to our *défense en droit*, and the special demurrer which answers to our exception *à la forme*. As regards the former, the only difference between the english pleading and ours is, that we are required to give special reasons, which is an improvement on the english system. There was an ordinance of France which compelled courts of justice to decide *in limine*. Why have an *enquête*, when, from the very allegations of Plaintiff, it appears he has no action ? I make these observations because I do not see why an *avant faire droit* should have been ordered as was suggested. Moreover, by the statute, a duplicate transfer must be delivered, not to make a transfer, but to make an entry thereof merely in the Company's books. Now, how can an action like this, which is to compel the making of a transfer, and not the mere entry thereof, be brought ? The statute in a case like this must be strictly interpreted. Damages are claimed in a matter wherein the Company is not placed *en demeure*. On the whole, I consider the judgment of the court below was good. Webster did not call on the Company to do anything. At all events he has not the present action.

DUVAL, J.: At the time of the argument, the case seemed so plain, that I only consented to take the case en *delibéré* out of deference to the learned judge who rendered the judgment in the court below. The *motifs* of the judgment themselves show that the court was led into error as to the fact. It has been argued on the part of the Company that the damages, if any, were sustained by the assignees and not by Plaintiff, inasmuch as the fall in the value of the stock took place after the assignment. Now, this is the error of fact that has been made. On referring to what has been termed an assignment, it will be found that Lemesurier, Routh & Co., are to account to Plaintiff for the monies they received, and, retaining the amount due to themselves, pay over the balance to Plaintiff. How then can it be said that Plaintiff is without interest ? The amount to be retained by Lemesurier, Routh & Co., is certain, it is the debt due to them by Plaintiff. The fall in the value of the stock necessarily diminishes the

balance which is to be paid over to Plaintiff, and cannot affect Lemesurier Routh & Co., who will claim from Plaintiff what they cannot get from the Company. The declaration alleges this damage to be so much per cent.; but the Company expect to get rid of this demand on a general demurrer, that is, admitting the fact alleged to be true, they say Plaintiff has no action. As to the alleged want of privity of contract, it is too plain to call for any remark. The Plaintiff is a stockholder, and to him the Company is responsible.

AYLWIN, J.: Appellant being possessed of 269 shares, of £25, stg., each, in the Grand Trunk Railway, on the 1st October, 1853, and being indebted to Lemesurier, Routh & Co., in the sum of £1403 15s. 7d. currency transferred to them 58 of these shares, as collateral security for the payment of the debt, and, in order that the firm might realise the amount of it, an assignment was executed, *in due form of law*, as the declaration alleges, in their favor, the whole on the understanding that the surplus of the proceeds, after deduction of Appellant's debt, should be paid to him by the firm. The declaration states that Lemesurier, Routh & Co., thereupon *duly demanded* of the Company to transfer the said 58 shares to them, and, then and there, also presented to the Company said transfer, and offered to surrender the same on the due enregistration of the same on the books of the Company; but that the Company wholly neglected and refused so to do, whereupon, on the 24th December, 1853, several similar verbal applications in the meantime having been fruitlessly made to the Company by the firm in question to the same effect, an application was made in notarial form by Gibb and his colleague, notaries, reiterating the former demands. It is then alleged that the Company persisting in the former refusals, the firm *duly protested* for *all costs, losses, damages, injuries*, and *hurts* suffered and sustained, or which therafter might be sustained in consequence of the premises, as the whole will more fully appear by reference to an authentic copy of such demand and protest, *herewith produced* and fyled, and to which Appellant in the declaration *particularly referred, as forming part of* those presents. A similar transfer upon the like conditions, is also alleged as having been made by Appellant to the savings bank of 210 other shares of the same railroad stock, and the demand and refusal to register are again stated in the declaration in substance as above mentioned. The declaration then proceeds to set out " that, in so refusing to transfer said several shares on the books of the said Company, as aforesaid, the Company assigned no legal or sufficient ground for withholding such transfer, and moreover had not any legal or sufficient ground or justification for so

acting but, on the contrary, were bound and liable forthwith on the demands so made as aforesaid, to transfer said several shares on the books of the Company, to the parties so demanding the same. That, at the said several periods, when the demands were so made on the Company to transfer the said several shares on the books of the Company, the 268 shares were worth, in the Montreal market, and were readily saleable therein at 17 per cent discount, and that, had the company transferred the shares on the books of the company, as they were bound to have done, Lemesurier, Routh & Co., and the bank who held the same in the interest of Plaintiff could have and would have sold and disposed of the same for an amount not less than £5494 sterling, or £6684 7s. 4d. currency. That notwithstanding all the foregoing premises, the Company still continued illegally to refuse to transfer on the books of the Company the 268 shares or any part thereof, until the 4th day of April, 1854, when the Company transferred on their said books the said 58 shares in favor of Lemesurier, Routh & Co., and, until the 13th day of May, 1854, when the Company transferred the said 210 shares in favor of the City and District Savings Bank of Montreal. That, in the interim between the time when the transfer so originally demanded and the respective dates when the transfer was so actually effected, the capital stock of the Company became depreciated in value, that the amount which Lemesurier, Routh & Co., and the Bank were enabled to obtain and realise for the 268 shares, which they caused to be sold with all reasonable and prudent despatch, after the transfers were so made, was £4353 4s. 2d. cy., instead of £6684 7s. 4d. cy., which they could easily have obtained and realised therefor, had they been allowed to have their said transfers recorded on the Company's books, at the period when the demands to that effect were first made as aforesaid; thereby causing a manifest loss to Plaintiff of at least £2331 3s. 2d. cy., independently of loss of interest and costs of protest and other damages incidentally suffered by Plaintiff, by reason of the said illegal and unjustifiable acts of the Company which said loss of interest, costs of protest and other incidental damages aforesaid, Plaintiff estimates at £668 16s. 10d. cy. That, by reason of the premises and by law, Plaintiff hath a right to recover from the Company the two amounts, as mentioned, which form united £3000 currency."

The court has ruled that it was not competent to Appellant to bring this action in his own name, and that, having parted with his stock the only action that could be brought was one by the assignees, that there could be no qualified transfer as to the Company, and that, as regarded third parties, the transfer must be absolute. Our well known rule of

law is *l'intérêt fait la mesure des actions ;* another rule well known is *toutes les actions sont de bonne foi.* It was quite competent to Appellant to make as many separate assignments as he held shares. This was not the cases of a partial transfer to several assignees, one debt for a gross sum, which would subject the debtor to parcel out his payments. in proportions dictated by the will of the creditor, instead of enjoying the privilege of liberating himself by one single payment of the whole debt.

The loss sustained by Appellant, by the alleged improper refusal of Respondent to recognize the transfer, was personal to himself, and he never made any assignment of his claim for damages or divested himself of it. Neither of the assignees could sustain an action to recover those damages, as they formed no part of the subject matter assigned. On the 4th April, 1854, and the 13th May, 1854, when the Company transferred the shares to the assignees, they had no direct action or claim against the Company to recover damages for the previous refusal to recognize the transaction. So far from appearing to claim damages, the assignees accepted the transfer on the books at the last hour when the Company agreed to it. The party really injured by the depreciation of his stock, and the fall in its value between the date of the assignments and the transfers, is Appellant and no one else and he alone can maintain an action in damages. Although the demand and protest were made not in the name of Appellant, but of the assignees, that is perfectly indifferent : such demand and protest enured to his benefit. In any case, instead of demurrer, the Company, if it had such a defence should have urged it by peremptory exception. The second ground upon which the court below proceeded, was, that it did not appear by the declaration that the Company were called upon to do an act which they were in law bound to do. That the general Railway Act 14 and 15 Victoria, cap. 51, sect. 17, prescribed a particular method for effecting transfer of stock and the declaration did not show the required formalities to have been pursued. That the wording of the statute should have been followed *rigoureusement à la lettre,* and that the declaration did not allege strict compliance with the form prescribed by the statute. As to the form of action, the words of the Judicature Act, 12 Victoria, cap. 38, sec. 87, which are the law prescribed to all our courts in Lower Canada, are express : " No form of action or of words is or shall be necessary in any declaration, &c. ; but the parties may and shall respectively state *bonâ fide* and to the best of their belief in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordi-

nary transactions of life do and shall apply, so that no allegation or statement may or shall be held to be insufficiently made if it would be ordinarily understood to have the meaning intended by the party using it. The form of transfer in the railway act must be pursued ; but in declaring in a court of law in a case like the present, no precise form is required. The 46th section of the Judicature Act again enacts that to all allegations of fact in any pleading the ordinary rules of legal construction shall apply so that it shall be sufficient to support any pleading that the facts alleged in it agree sufficiently with those proved to maintain the conclusions of such pleading, or some of them, and that the court shall be of opinion that the opposite party could not have been misled by such pleading as to the real nature and effect of the facts intended to be therein alleged and to be proved under such pleading, and the court may, in his discretion, *at any time before judgment*, and on such conditions as it shall deem just, allow any pleading to be amended, so as to agree with the facts proved, if the court shall be of opinion that the ends of justice will be promoted by allowing such amendment."

In this case could the Company be misled by this declaration as to the forms of transfer of its own stock, when it is alleged that after this refusal they recognized the transfer in question and entered them on their books? I have often had to regret that formal objections are two much encouraged in our courts, contrary to both the letter and the spirit of our own law. With reference to demurrer in particular, it is purely english, and in direct opposition to the french and continental courts. Under the law of Scotland, it is well observed in an able article to be found in the 17th volume of the *London Law Journal*, p. 235 : " The reason of the important difference between jury trial as customary in England and as introduced into Scotland the issue in the former evolving itself out of the pleadings, and being directed in the latter by the judges in concurrence with the suitors), is obvious enough. The scottish mode of pleading by condescendences and answers is loose and argumentative, and not subject to the discipline of demurrers." If the *articulation de faits* of our own law, which is tantamount to the condescendence, were more favored, amendments facilitated at small expense, and the costs of unnecessary *enquêtes* made to fall on the party occasioning them, the demurrer would soon decline, if not altogether cease. The resort to this mode of defence has, on several previous occasions, been productive of great loss to Defendants availing themselves of it, by the reversal in this court, of judgments which they had obtained in the other

courts. This case must have the same fate. The judgment of the court below will be reversed with costs, and the demurrer overruled.

The judgment of the Superior Court was reversed, and the judgment of the Court of Appeals was in the following words: "The court, considering that the depreciation in the value of the capital stock of Appellant is stated to have been occasioned by the unlawful refusal of Respondent to permit and allow Appellant to dispose of and transfer the same; considering that Appellant has alleged injury sustained by himself, by an act of Respondent, for which he has personally a right to demand damages from Respondent; considering that Respondent should properly have availed themselves of a defence to the merits, and that the *défense au fonds en droit*, by them pleaded, is insufficient and unfounded in law, and that, therefore, in the judgment of the court below, by which the said *défense au fonds en droit* has been maintained and Appellant's action has been dismissed, there is error; it is considered and adjudged that the judgment rendered by the Superior Court, at Montreal, on the 28th day of June last, be and the same is hereby reversed; and, proceeding to render the judgment which the court below ought to have rendered, it is further considered and adjudged that the *défense au fonds en droit* be and the same is hereby overruled; that the parties do proceed to the adduction of evidence upon the issue of fact between them." (The Hon. Mr. Justice Mondelet, *dissentiente.*) (3 *J.*, p. 148.)

BETHUNE and DUNKIN, for Appellant.

CARTIER and BERTHELOT, for Respondent.

ANDREW ROBERTSON, Counsel.

SHERIF.—GARDIEN.—CONTRAINTE PAR CORPS.

COURT OF QUEEN'S BENCH, IN APP., Montreal, 3rd Sept., 1858.

Coram Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., CARON, J.

LEVERSON et al. (Plaintiffs in the court below), Appellants, and BOSTON, Sheriff (Mis en cause in the court below), Respondent.

Held: 1° That the sheriff is the guardian of goods seized, when the Defendant offers none.

2° That, in a rule for *contrainte par corps* against a guardian, it is not necessary to offer any alternative, in the default of producing the moveables seized.

3° That, when the guardian, by way of answer to such rule, pleads

that the property is only worth a particular amount, it becomes the duty of the court, *avant faire droit*, to order proof of the fact.

4° That the *onus probandi* falls on the guardian.

5° That the sheriff although over 70 years of age is liable *par corps*. (1)

This was an appeal from a judgment of the Superior Court, at Montreal, reported at page 446 of 5 R. J. R. Q.

LaFontaine, C. J.: Le 3 août 1854, les Appelants font émaner, contre James Cunningham, un bref de *capias ad respondendum*, accompagné d'un bref de *saisie-arrêt avant jugement*, sur lequel bref de saisie-arrêt, le député shérif fait rapport, le premier septembre 1854, qu'il a saisi suivant-procès verbal annexé, ajoutant: " which said goods, chattels and effects I have put into the guardianship of David Garrick, to abide the order of this honorable court." Dans son procès-verbal de saisie, l'huissier Bates dit qu'il a nommé Garrick " gardien d'office," et Garrick signe comme tel. Le *capias* fut mis de côté, mais la saisie-arrêt fut déclarée bonne et valable, par un jugement du 18 février 1855, qui condamne le Défendeur Cunningham à payer aux Demandeurs, Appelants, une somme de £666. Il est à remarquer que cette cause portait le numéro 363. Une autre saisie-arrêt avait aussi été émanée, de la part des mêmes Demandeurs contre le même Défendeur, *en maintierce*, c'est à dire, entre les mains de Canfield Dorwin et autre, tiers-saisis, portant le numéro 375. Les Demandeurs furent déboutés de cette dernière saisie-arrêt, par un jugement du 29 septembre 1854. Dès le lendemain, sur la présentation qui lui est faite de ce jugement, le shérif signe et fait remettre à Bates un ordre dans la cause n° 375 lui ordonnant de remettre les effets saisis au Défendeur, c'est ce que fit Bates le lendemain, 30 septembre. Après jugement sur la saisie dans la cause n° 363, les Demandeurs firent émaner une exécution sur ce jugement, et après le rejet d'une opposition de la part du Défendeur, ils firent émaner un bref de *venditioni exponas* pour faire vendre les effets saisis par Bates. Le shérif fit rapport qu'il n'avait pu vendre ces effets vu que le gardien Garrick ne les avait pas produits. Le shérif, en recevant le jugement du 29 septembre 1854, ne fit pas attention que ce jugement avait été rendu dans une cause autre que celle dans laquelle les effets avaient été saisis, et dans laquelle il n'y avait pas encore eu de jugement. De là l'erreur qu'il commit par son ordre du 30 septembre 1854 de délivrer, en vertu d'un jugement rendu dans la cause n° 375, des effets qui n'avaient été saisis que dans la cause n° 363 et qui, alors, étaient encore sans saisie. Sur motion des Appelants dans la cause n° 363, la cour émana une règle ordonnant au shérif de produire les

(1) V. art. 560 et 597 C. P. C.

effets, pour qu'ils soient vendus, et le condamnant à la contrainte par corps jusqu'à ce qu'il ait remis les effets ou ait payé le montant de la créance des Appelants. Le shérif plaida qu'il ne pouvait être condamné à remettre les effets vu qu'il n'en était pas le gardien, et qu'un gardien (Garrick) avait été nommé. Il ajouta que les effets saisis ne valaient que £50, et qu'il n'était pas sujet à la contrainte par corps, vu qu'il était agé de 71 ans.

Le 25 février, est intervenu le jugement dont est appel, lequel jugement est en ces termes : " The court considering that Plaintiffs have failed to establish, by reason of any of the allegations in the rule by them taken on the sheriff, any legal right to have and maintain the conclusions of said rule, namely, that the sheriff do produce said goods and chattels by him seized at the suit of Plaintiffs, or, in default thereof, that he do pay Plaintiffs the amount of the judgment obtained by Plaintiffs against Defendants, doth discharge said rule."

Pour ce qui regarde la responsabilité du shérif, à défaut de représentation des effets saisis, et la *contrainte par corps* qui, en pareil cas, peut être prononcée contre lui, c'est un point qu'il n'y a plus à discuter. Je renvoie à ce que j'ai dit sur la même question dans la cause de Irwin, Appelant, et Boston, Intimé, jugée le 1er octobre 1857. (4 *R. J. R. Q.*, p. 392.)

L'un des moyens invoqués par l'Intimé pour se soustraire à la *contrainte par corps*, est qu'il a atteint l'âge vénérable de 70 ans bien et duement accomplis. Malheureusement, le statut qui exempte les septuagénaires de l'emprisonnement, la 7 G. IV, ch. 19, fait une exception expresse du shérif ; cet officier continue quel que soit son âge, d'être soumis à la *contrainte par corps*, disposition qui est de nouveau confirmée par le statut de 1849, ch. 42, s. 15. D'après l'ordonnance de 1667 (1), dans sa disposition relative au sujet, confirmée par les deux statuts en dernier lieu cités, auquel on peut encore joindre la 9e section du statut de 1836, ch. 15, il y a donc lieu à la contrainte par corps contre le shérif ; c'est là un droit dont la partie qui a fait saisir les effets non représentés peut réclamer l'exercice. Le nouveau Code civil français, art. 2060, a reproduit la disposition de l'ordonnance de 1667, dans les termes suivants: " La contrainte par corps à lieu... 4° pour la représentation des choses déposées aux séquestres, commissaires et autres gardiens." Mais, dans l'un et l'autre droits, le juge ne peut prononcer la contrainte par corps que lorsqu'elle lui est demandée. Rodier disait, sur l'art 4 du titre 34 de l'ordonnance de 1667 : " La contrainte par corps ne doit être prononcée avec la condamnation, qu'autant qu'elle sera demandée ;

(1) Tit. 34, art. 4.

parceque, quand même le Défendeur serait dans le cas de la contrainte par corps, il dépend du Demandeur de ne pas l'exiger." Voir aussi Pigeau, éd. de 1779, t. I, p. 411 ; et Troplong, sur le nouveau Code, dans son traité de la contrainte par corps, n° 234, dit : " C'est une règle générale que le juge ne peut prononcer la contrainte par corps que lorsqu'elle lui est demandée. Dans les matières qui tiennent à l'utilité privée, le juge ne doit prêter son office que lorsqu'il en est requis." Mais toujours quand la contrainte est ainsi demandée à défaut de représentation d'effets saisis, doit-elle être accordée ? Troplong, dans l'ouvrage déjà cité, n° 142, dit que, dans le cas de l'article 2060 du Code, " la contrainte par corps a lieu impérativement et non d'une manière facultative pour le juge, elle est prononcée, non seulement pour la restitution de la chose, mais encore pour la représentation de cette même chose." Il me semble qu'il en devait être de même sous l'empire de l'Ordonnance de 1667. Je ne vois pas de différence entre l'art. 4 du titre 34, de cette Ordonnance, et l'article 2060 du code Napoléon. L'ordonnance, en permettant au créancier de demander l'application de cette voie rigoureuse, n'a pas exigé que cette demande fut subordonnée à l'offre d'une alternative au gardien pour se libérer, c'est un droit dont elle autorise le créancier à réclamer l'exercice purement et simplement. Si celui contre lequel la contrainte par corps peut être ainsi demandée, a, soit par la loi, soit par la jurisprudence des arrêts, quelque alternative ou faculté à faire valoir, pour repousser cette contrainte, ou pour en faire modifier l'application, c'est à lui à l'invoquer formellement, et alors le juge doit apprécier les circonstances. Mais, quant au créancier, lorsqu'il se borne à demander purement et simplement la contrainte par corps, il me semble qu'il fait ce que la loi lui permet et que sa demande est valablement faite, bien qu'elle ne contienne pas l'offre d'une alternative, par exemple, un *si mieux n'aime* de payer soit la dette soit seulement la valeur des effets non représentés : d'un autre côté, il me semble déraisonnable de prétendre que l'offre d'une telle alternative soit incompatible avec la demande de la contrainte et doive la faire repousser. Le créancier qui aurait pu présenter sa demande sous la forme la plus rigoureuse, ne doit pas être puni pour l'avoir présentée sous une forme plus favorable au shérif. Je pense donc que, non seulement la seconde motion du Demandeur pour contrainte, faite avec le *si mieux n'aime* payer sa créance, procédait valablement, mais que même leur première motion qui n'offrait pas cette alternative et qui a été rejetée par le jugement du 30 mai 1856, était valablement faite, sauf au shérif, d'un côté, à demander la modification des conclusions, et, de l'autre, à la cour à accorder cette modification, même d'elle

même, si la jurisprudence qui s'est formée sous l'Ordonnance de 1667 l'autorise à le faire. Mais, ni dans l'un ni dans l'autre cas, le tribunal de première instance ne devait rejeter en entier la demande pour contrainte par corps. Car la loi donnait aux Demandeurs le droit de présenter cette demande.

Il peut arriver que la valeur des effets non représentés soit bien au-dessous du montant de la créance pour laquelle ils ont été saisis. Dans ce cas le dommage qu'éprouve le créancier ne peut excéder cette valeur. Si le shérif lui fournit cette valeur en deniers, et qu'il fasse voir que la non-représentation des effets ne peut être attribuée à aucune fraude de sa part, le créancier doit être satisfait, car il obtient pleine réparation. Il est juste qu'il soit alors libéré de la contrainte. On peut donc, suivant les circonstances, lui donner l'alternative de payer la valeur des effets. Telle était, dans les derniers temps, la jurisprudence en France, sous l'ancien droit, ainsi que le certifient les auteurs du *Nouveau Denisart*, au mot " Gardien," § 4, n° 6. Le jugement que nous avons rendu dans la cause de *Irwin* et *Boston*, consacre cette jurisprudence. Les Appelants ayant demandé la contrainte par corps, le tribunal aurait dû la leur accorder, sauf à y ajouter l'alternative d'un si mieux n'aime payer la valeur des effets, une fois cette valeur bien et duement établie.

The following is the judgment of the Court of Appeals : " La cour, 1° considérant que, dans l'état de la cause, les Appelants étaient bien fondés à demander, en cour de première instance, la contrainte par corps contre le shérif, l'Intimé en cette cause ; que cette demande n'aurait pas dû être rejetée comme elle l'a été par la dite cour ; 2° considérant que le shérif a, dans ses réponses par écrit à la demande de la contrainte, allégué que les effets saisis et non représentés par lui, n'excédaient pas en valeur la somme de cinquante livres courant, et est censé par là avoir demandé que, si la contrainte était prononcée contre lui, il lui fût donné l'alternative de s'en libérer en payant aux Appelants la valeur des effets ; que, dans ce cas, la cour de première instance, après audition des parties, aurait dû ordonner, avant faire droit, que preuve fût faite, sans délai, à la satisfaction de la cour, de la valeur des effets saisis et non représentés, pour ensuite être la contrainte par corps prononcée contre lui, avec l'alternative de s'en libérer en payant aux Demandeurs la valeur ainsi prouvée ; 3° considérant que tous les moyens invoqués par le shérif, dans ses réponses par écrit, sont mal fondés, à l'exception de celui qui est relatif à la valeur des effets ; 4° considérant, par conséquent, que, dans le jugement, dont est appel, il y a mal jugé : infirme le susdit jugement, rendu le 28 de février, 1857, par la Cour Supérieure siégeant à Montréal : et, cette conr, procédant à rendre le juge-

ment que la Cour Supérieure aurait dû rendre, et déclarant que la demande de la contrainte par corps procédait valablement contre le shérif, Intimé, rejette tous les moyens invoqués par lui dans ses réponses par écrit, à l'exception de celui qui est relatif à la valeur des effets, et adjuge qu'avant faire droit en la Cour Supérieure, sur la demande d'une contrainte par corps, il soit ordonné par elle que preuve soit faite de la valeur des effets saisis et non représentés par le shérif pour ensuite être la contrainte par corps prononcée contre lui par la Cour Supérieure, avec l'alternative de s'en libérer en payant aux Demandeurs la valeur ainsi prouvée ; chaque partie payant ses frais sur le présent appel. (L'honorable Juge en chef différant quant à l'adjudication des frais.) (2 *J.*, p. 297.)

DAVID and RAMSAY, for Appellants.

BETHUNE and DUNKIN, for Respondent.

GARDIEN.—SHERIF.—RESPONSABILITE.

COUR SUPÉRIEURE, Montreal, 28th October, 1858.

Coram MONDELET (C.), J.

LEVERSON et al. *vs.* CUNNINGHAM, and BOSTON, Sheriff, Mis en cause.

Held: In the case of a rule for contrainte against the sheriff as gardien, allowing no alternative but payment of Plaintiff's debt, where, in consequence of the sheriff having pleaded that the value of the effects was only of a certain amount, the Court of Appeals has ordered that proof be made of such value and that the rule be made absolute with power to the sheriff to liberate himself from the contrainte, on payment of such value; that notwithstanding such judgment of the Court of Appeals, and the proof made thereunder, the rule will be dismissed on the ground that it does not itself give the alternative of paying the value of the effects seized.

This was a final hearing on the rule for *contrainte par corps*, respecting which reports are to be found *suprà* p. 55, after proof had been made of the value of the affects seized, as ordered by the judgment of the Court of Appeals, contained in the last report referred to. At the argument, it was contended, on the part of the sheriff, that the rule should be declared absolute, leaving to the sheriff, in the terms of the judgment of the Court of Appeals, the right to liberate himself. on payment of the value of the effects, which, it was further contended, was clearly proved not to exceed £50 currency. And it was argued, on the part of Plaintiffs, that the proof as to the value was wholly insufficient, and that the rule should simply be declared absolute.

MONDELET (C.), J.: There can be no doubt that I must obey the order of the Court of Appeals in this case, although my opinion may be different. That court has prescribed what the judgment of this court shall be; but I shall give judgment on my own responsibility. The Court of Appeals ordered an *avant faire droit*, ordering the sheriff to make proof, although there was nothing about value in the rule. I am, of course, bound to carry out this order; but the question arises, how am I to apply this proof in giving judgment on the rule as drawn? If the judgment of the Court of Appeals goes too far, I am not pliant enough to obey it. The Court of Appeals cannot dictate to this court what judgment it shall render. I know of no court having such power, unless it be in Turkey, where "might is right." When this court was called, finally to adjudicate upon the evidence, it had to ascertain whether the evidence adduced could be applied to the *libellé*, plaint, demande, or rule, or whatever proceeding they might have before them whatever might be its name or character. Upon investigation, the court here found the evidence altogether inapplicable to the *demande libellée*, or rule in this cause issued. The answer of the sheriff the court could not, of course, look at, or, at least, judicially take notice of it; it was no part of the *libellé* of Plaintiffs. As well might the court take upon itself to adjudicate in favor of a Plaintiff, upon allegations which were not to be found in his declaration, or upon allegations in a special answer omitted in the declaration. Such a doctrine, elementary and universally known as well as generally admitted by men conversant with their profession, ought not to be overlooked by this court, and it was not overlooked. This court was fully satisfied, that, were it to apply the evidence, such as it was, to this rule, and adjudicate in favor of the Plaintiff, and grant him, not what he had alleged and prayed for, but what he had neither alleged nor prayed for, the judgment would be a nullity. It would be open to the *requête civile*, under the operation of the 34th article, of the 35th title of the Ordinance of 1667. In vain would it be urged upon this court that all proceedings were *de bonne foi*. If that was to be the rule, or rather if there was to be no rule whatever, then all the science of the procedure, and Pigeau and others, might be cast aside, and the will of judges, instead of well understood rules, be law. Of course with such a doctrine, there would be an end to all security, and the judges might, with impunity, disregard the fundamental golden rule of the roman law: "Sententia debet esse libello conformis et potestas judicis ultra id quod in judicium deductum est nequaquam potest excedere." This court could not and would not disregard that maxim, and much less

the Ordinance of 1667; both of which, in as far as the present case was concerned, were justice and common sense. The rule must, therefore, be dismissed with costs. Rule dismissed (3 *J.*, p. 97).

T. K. RAMSAY, for Plaintiffs.

BETHUNE and DUNKIN, for the Sheriff.

SHERIF.—GARDIEN.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 4th May, 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL and MEREDITH, Justices.

LEVERSON et al., Plaintiffs, Appellants, *vs.* CUNNIGHAM, Defendant, and BOSTON, Mis en cause, Respondent.

Sur procédure par règle pour contrainte par corps contre le shérif, la Cour d'Appel ordonna qu'il serait fait preuve en Cour Inférieure, avant de prononcer sur la contrainte, quant à la valeur des effets saisis et non représentés par le shérif, et lui donna l'alternative de payer la valeur des effets afin de se libérer de telle contrainte; la preuve fut faite et la cour renvoya la règle pour contrainte par le motif que la preuve n'était pas applicable à la règle, telle qu'elle subsistait, laquelle demandait simplement la contrainte, sans égard à la valeur des effets saisis;

Jugé: 1° Qu'il y avait mal jugé dans le jugement de la Cour Inférieure;

2° Que les Appelants devaient payer les frais d'appel en autant que le shérif avait offert à leur procureur la valeur des dits effets, eux, les Appelants, ne résidant pas dans la Province, telles offres ayant été faites après jugement, mais avant qu'on eût interjeté appel.

On the 3rd September, 1858, the Court of Appeals rendered the judgment reported *suprà*, p. 60 and the record having been transmitted to the Superior Court, Montreal, the parties went to proof, witnesses were examined on behalf of the sheriff, but none on behalf of Plaintiffs. It is unnecessary to enter into the detail of the proof made, inasmuch as, by the judgment rendered in the Superior Court, the evidence as given, was held not to be applicable to the rule in question, and no opinion expressed as to its legality or sufficiency, and inasmuch as it was considered in appeal as establishing the value of the goods at less than £50. The judgment in the Superior Court appealed from was rendered in the 28th of October, 1858, and was in the following terms (MONDELET, Justice):

"The court, considering that the judgment of the Court of "Queen's Bench of the 3rd day of September, 1858, ordering, "*avant faire droit*, that proof be had and made of the value "of the goods and chattels seized and taken in execution, and

" not represented by the sheriff of this district, the *mis en* " *cause*, has been carried out and executed; considering, never- " theless, and notwithstanding such evidence in this instance, " adduced by the sheriff, that there is no evidence which can " or ought to be applied to the matter alleged and set forth by " Plaintiffs in the rule or order of this cause, which they have " obtained upon this motion or *demande* to that effect; con- " sidering that this court has no power or authority whatever " to adjudicate in favor of Plaintiffs upon matters which are " foreign to, or are not alleged and set forth in their motion or " *demande*, and that any judgment which this court would " render, if it awarded more than prayed for, or what is not " prayed for or was not in conformity with the *demande* of " Plaintiffs would be absolutely null and void, as being in " open violation of the law, and liable to be set aside upon a " *requête civile*, under the operation of the 34th article of the " 35th title of the Ordinance of 1667, dismisses the rule in " this cause obtained by Plaintiffs." On the 29th October, 1858, the sheriff made a notarial tender or offer to Plaintiffs, through their attorney of record, of £50 for the value of the goods and £5 for costs upon the rule. This tender was not accepted. At the argument in appeal, it was contended, on behalf of Appellants, that the evidence offered by the sheriff was in part illegal, as made by parties incompetent and interested, and as being insufficient to establish the value of the goods at less than £50, as contended for by the sheriff; and that if such value were established Plaintiffs were entitled to interest. The judgment as rendered was not supported by Respondent's counsel, but it was contended that the value of the goods having been offered and tendered in the only way such tender could be made to parties residing out of the Province, Appellants should not have brought the appeal, and should be condemned to pay costs to Respondent.

LAFONTAINE, Chief-Justice: It is surprising enough to find that a judgment has been rendered by the Superior Court, which sets aside a decision of this court so recently rendered on an appeal between the same parties. The judgment of this court ordered proof as to the value of the goods seized and not represented by the sheriff, and gave the sheriff the alternative to free himself from the *contrainte par corps* to be pronounced against him by the Superior Court, on payment of such proved value. That proof has been made, and the value of the goods shewn to be not more than £50, which sum, with the costs, was tendered to the attorneys of Appellants, and should have been accepted. The judgment below must be reversed, with costs against the Appellants.

AYLWIN, Justice: In relation to the costs, Appellants must

pay them, if for no other reason, than that the answer of the sheriff to the rule or *demande* made on him amounts to a confession of indebtedness to the extent of £50, and should have been accepted by Plaintiffs, they have not done so, and must, under the provisions of the law, pay the costs. As to the proof made under the rule it was sufficient to show the value to be less than £50. But if there was doubt on that point, who was to blame ? The Plaintiffs had themselves sold the goods to Defendant, they had their clerk, their account sales, and the custom house entries to bring up, but they have examined no witness. It is a matter of regret that this case should have come up again before this court under the circumstances, and I would fain hope there is some mistake in attributing to the judge below, the extraordinary language made use of in the report of the case. It would appear as if the court below had reversed the decision of this court, and had decided that no alternative such as given by the judgment here should have been allowed, and that the evidence could not be held applicable to the rule against the sheriff without violation of the first principles of law. Now, the rule against the sheriff was a *demande*, it prayed that the sheriff be committed to jail, until he produce the goods or pay a sum of money exceeding £400, as the balance of the judgment against Defendant. The answer of the sheriff was equally intelligible, and the question as to the right of granting the alternative of paying the value of the goods was the very question which was discussed fully and decided by this court. It is true that this court does not dictate to another tribunal what judgment it should render; but if a judge should persist, again and again, in holding to his own views, and declare thatthedecisions of this court are against elementary principles, it is difficult to say what confusion may not be introduced into the administration of justice. In the case before us, the judgment appealed from is repudiated by both parties alike; but Appellants, having refused to accept the value of the goods as established, must lose their appeal and pay the costs.

JUGEMENT : " 1° considérant que les parties à cet appel " ont, en conformité au jugement rendu par cette cour, le " le troisième jour du mois du septembre dernier, procédé à la " preuve de la valeur des effets saisis et non représentés par " l'Intimé, dont il s'agit ; que cette valeur a été prouvée ne " pas excéder la somme de cinquante louis cours actuel, ainsi " que le shérif l'avait allégué dans ses réponses par écrit à la " demande de contrainte par corps formée contre lui ; qu'il " n'y a pas eu de mauvaise foi de la part du shérif ; que, dans " les circonstances, il a fait la seule preuve qu'il fût en son " pouvoir de faire, preuve qui aurait pu être contredite ou at-

" taquée par les Demandeurs qui, néanmoins, se sont volon-
" tairement abstenus de le faire ; 2° considérant que la de-
" mande de la contrainte par corps procédait valablemnt
" contre le shérif, qu'elle aurait dû être prononcée contre lui
" avec l'alternative de s'en libérer en payant aux Demandeurs
" la valeur des effets ainsi prouvée, que, par conséquent, dans
" le jugement qui fait le sujet du présent appel, il y a mal
" jugé en ce que la demande de la contrainte par corps est
" rejetée, infirme le jugement rendu le vingt-huitième jour
" d'octobre dernier, par la Cour Supérieure siégeant à Mont-
" réal, et, cette cour, prononçant le jugement que la dite Cour
" Supérieure aurait dû rendre, déclare bonne et valable la de-
" mande de la contrainte par corps formée contre le shérif,
" *mis en cause*, et, en conséqence, ordonne que John Boston
" soit contraint par corps et emprisonné dans la prison com-
" mune du district de Montréal, à moins que, sous huit jours
" du prononcé du présent jugement, il ne dépose entre les
" mains du greffier de la Cour Supérieure, vu l'absence des De-
" mandeurs de ce pays, la somme de cinquante louis cours ac-
" actuel, pour leur tenir lieu des effets saisis et non représentés
" comme susdit, quoi faisant, sera le dit Boston bien et vala-
" blement déchargé de la contrainte par corps, sinon et à faute
" de ce faire, sera la contrainte, après l'expiration des dits huit
" jours exécutoire contre lui, jusqu'à ce qu'il ait fait le susdit
" dépôt entre les mains du greffier de la dite somme de cin-
" quante louis cours actuel, ou l'ait autrement valablement ac-
" quittée, le tout, avec dépens contre Boston en Cour Supé-
" rieure, mais avec dépens contre les Appelants, au profit
" de Boston, sur le présent appel." (9 *D. T. B. C.*, p. 238.)

RAMSAY, for Appellant.

BETHUNE and DUNKIN, for Respondent.

ACTION EN DECLARATION D'HYPOTHEQUE.—DELAISSEMENT.—CHOSE JUGEE.—CAUTIONNEMENT EN APPEL.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 3 septembre 1858.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., CARON, J.

MÉTRISSÉ dit SANS-FAÇON et al. (Défendeurs en Cour Inférieure), Appelants, *vs.* BRAULT (Demandeur en Cour Inférieure), Intimé.

Jugé : 1. Qu'un jugement rendu dans une demande en déclaration d'hypothèque condamnant le Défendeur à délaisser et dont il a interjeté appel, n'est pas passé en force de chose jugée. (1)

2. Que le délaissement par suite de ce jugement pourra être valablement fait après jugement confirmatif en appel ;

3. Que le cautionnement sur l'appel, qui n'est donné que pour " dépens et dommages," et non pas pour satisfaire à la condamnation est nul et doit être rejeté. (2)

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef : Il s'agit d'une demande en déclaration d'hypothèque, dans laquelle un jugemant du 18 novembre 1857, a condamné les Appelants, ou ceux qu'ils représentaient, à payer à l'Intimé la somme de £1047 10s. ou à délaisser, sous quinze jours, l'emplacement y désigné. Le 6 mars 1858, les Appelants présentèrent une requête " Aux honorables Juges de la Cour Supérieure, siégeant à Montréal, et aux protonotaires de la cour," exposant : 1. la nature du jugement ; 2. que l'immeuble est bien inférieur en valeur à la condamnation ; 3. suppliant de les autoriser à délaisser le dit immeuble conditionnellement en justice, pour avoir tel délaissement sa pleine force et effet définitif, dans le cas où le jugement susmentionné serait confirmé en appel, aussi bien que dans le cas où le dit appel ne serait pas efficacement poursuivi, mais pour être tel délaissement nul et non avenu, dans le cas où le jugement serait infirmé en appel.

Au bas de cette requête est écrit ce qui suit : " Qu'il soit fait ainsi que requis, Montréal, ce 6 mars 1858. MONK, COFFIN et PAPINEAU, P. C. S." Puis l'on voit que le même jour les Requérants font un acte de délaissement, dans lequel on lit : " lesquels, pour éviter casuellement les conséquences du jugement en déclaration d'hypothèque prononcé contre eux, le

(1) V. art. 1241 C. C.

(2) V. art. 1122 C. P. C.

18 novembre dernier, à la poursuite du Demandeur par reprise d'instance, et en conséquence de l'option à eux déférée par la coutume et le jugement, et en vue de l'appel que les comparants entendent interjeter du jugement, déclarent qu'aux risques, périls et fortune de qui il appartiendra, ils délaissent conditionnellement en justice l'immeuble mentionné et désigné au jugement comme suit,.... pour tel délaissement avoir sa pleine force et effet, dans le cas où les comparants ne poursuivraient pas efficacement l'appel du jugement, et dans le cas où le jugement serait confirmé en Cour d'Appel, mais pour être tel délaissement nul et non avenu dans le cas où le jugement serait infirmé en Appel, et le présent délaissement ne devant pas, par conséquent, être considéré comme un acquiescement au jugement, dont et de tout ce que dessus les comparants ont requis acte, à eux accordé." "Reconnu devant nous le 6e jour de mars 1858. MONK, COFFIN et PAPINEAU."

Le cautionnement sur l'appel est du 9 mars 1858, et n'est douné que pour "dépens et dommages," ce qui a porté l'Intimé à demander, par motion du 1er juin dernier, le renvoi de l'appel "inasmuch as the security is insufficient, particularly, inasmuch as no good and sufficient security for payment of the debt awarded by the judgment of the court below or for satisfaction of the judgment, if it were to be confirmed by judgment of this Court of Queen's Bench, has been entered into and furnished." La question qui nous a été soumise est donc celle de la validité du cautionnement. La loi (1) exige que celui qui interjette appel, donne caution "qu'il poursuivra "effectivement le dit appel et satisfera à la condamnation, et "aussi paiera tels dépens et dommages qui seront adjugés, en "cas que le jugement ou la sentence de la Cour du Banc du "Roi soit confirmé, ou que l'Appelant convienne et déclare "par écrit au gref de la cour dont est appel, qu'il ne s'oppose "point que le jugement rendu contre lui ait son effet, suivant "la loi ; à cette condition il donne seulement caution des dépens "d'appel, en cas qu'il y succombe, etc." L'article 1er du titre 27 de l'ordonnance de 1667, porte que "ceux qui auront été condamnés par arrêt ou jugement, *passé en force de chose jugée*, à délaisser la possession d'un héritage, seront tenus de ce faire, quinzaine après la signification de l'arrêt ou jugement faite à personne ou domicile, à peine, etc. ; et l'article 5, que les "sentences et jugements qui doivent *passer en force de chose jugée*, sont ceux rendus en dernier ressort *et dont il n'y a appel, etc.*" L'appel suspendant l'effet du jugement celui que les Défendeurs ont interjeté a arrêté l'exécution du jugement qu'ils attaquent. L'un des effets de cet appel est donc que ce

(1) *Acte de judicature* de 1793, ch. 6, s. 27.

jugement n'est pas encore passé en force de chose jugée. Il ne pourra l'être que par une sentence confirmative de cette cour dans laquelle le litige est, par suite de l'appel, porté et continué. De toute nécessité, le délai pour délaisser l'héritage se trouve prorogé, ou plutôt il ne devra courir que du jour de la sentence confirmative. Les Défendeurs sont dans la même situation qu'ils seraient si le jugement attaqué n'avait pas fixé le délai pour faire le délaissement. En effet, il n'est pas essentiel que mention soit faite de ce délai dans le jugement, (1) non plus que de la clause *si mieux n'aime, etc.* (2) Le condamné a, de droit, et l'option et la quinzaine pour faire le délaissement, du moment que le jugement a passé en force de chose jugée : En Canada, les juges ont le pouvoir de proroger ce délai, voir ce qu'on appelle la *rédaction* de l'ordonnance. (3) Si nous venions à rendre un jugement confirmatif, rien n'empêche que nous déclarions que la quinzaine courra du jour qu'il sera rendu, ou que même nous accordions un plus long délai. Ce ne serait qu'un surcroît de précaution. Dans une demande en déclaration d'hypothèque, c'est le délaissement qui est considéré comme l'objet de l'action et du jugement, le paiement de la dette n'est qu'une faculté accordée au détenteur pour éviter ce délaissement. Il est vrai qu'on est dans l'habitude de conclure que le Défendeur soit tenu de payer, si mieux il n'aime délaisser. Mais ces conclusions ne sont pas exactes : " C'est," comme dit Pothier, (4) " mettre la charrue devant les bœufs." Le cautionnement que les Appelants avaient à donner, était purement et simplement, quant à la question qui nous occupe, qu'ils *satisferaient à la condamnation*, ce qui devait consister, au cas d'un jugement confirmatif en appel, à faire le délaissement dans le délai voulu, ou, sinon, à payer la dette.

Le jugement en appel est motivé comme suit : " The court seeing that although the liability of Appellants, as the party condemned in the court below, is only conditional, and notwithstanding that the same judgment is in the alternative, yet, that, pursuant to the statute of the 34 Geo. III, chap. 6, sect. 27, he was held to give security to answer the condemnation, and that the bond given by him is irregular and defective, in omitting an undertaking to that effect ; but seeing that the insufficiency of the bond furnished by Appellant, under like circumstances, may, under the powers vested in this court

(1) Rodier, sur l'ordonnance de 1667, tit. 27, article 1. Ed. de 1770, p. 552.

(2) Pothier, *Traité de l'hypothèque*, p. 444. Ed. in-4o de 1777.

(3) " En ce qui concerne les délais, qu'ils seront prorogés par les juges en leur conscience et comme ils le jugeront à propos à cause de la difficulté qui se rencontre à voyager en ce pays."

(4) Pothier, déjà cité p. 445.

by the ordinance of the 25 Geo. III, cap. 2, sec. 6, be supplied; it is ordered that Appellants be admitted to prosecute their said appeal, on giving good and sufficiently security, within one month, to prosecute the appeal, to answer the condemnation, and to pay all such costs and damages as shall be adjudged in case the judgment of the Superior Court be affirmed and, upon payment of the costs of the rule obtained by Respondent, on the first day of June last, failing which, it is ordered that the said rule be, and the same is hereby made absolute, and the appeal dismissed with costs." (2 *J.*, p. 303.)

DOUTRE and DAOUST, for Appellants.

MACKAY and AUSTIN, for Respondent.

TEMOIN.—TAXE.

IN THE CIRCUIT COURT, Québec, 23 novembre 1858.

Before CHABOT, Justice.

VEILLEUX *vs.* RYAN.

Jugé: Qu'un témoin ne peut poursuivre pour le montant de sa taxe, mais qu'il doit procéder par voie d'exécution pour en prélever le montant sur les effets de la partie qui l'a sommé, en vertu des dispositions de la 22 Vic., cap. 5, sec. 9. (1)

The Plaintiff sued Defendant to recover the sum of two dollars, being the amount of his taxation as a witness on behalf of Defendant, in a cause wherein one Gunner was Plaintiff, and Ryan Defendant. Plea.: *Res judicata,* and that, under the provisions of the 22 Vic., cap. 5, sec. 9, the taxation of a witness stood as a judgment in his favor against the party on whose behalf he was summoned, and that, at the expiration of the delay allowed for the payment of judgments, fifteen days from the day of his taxation, Plaintiff, could and should have sued out execution against the effects of Defendant for the sum which he now claimed; and that, this being the remedy prescribed by law, Plaintiff could not disregard it, and adopt a different mode of enforcing payment of the amount of his taxation as a witness; and that his present action could not therefore be maintained.

CHABOT, Justice: The plea of Defendant is well founded in law, and the action must therefore be dismissed. (9 *D. T. B. C.*, p. 6.)

LANGEVIN, for Plaintiff.

AUSTIN, for Defendant.

(1) V. art. 281 C. P. C.

AUBERGISTE.—RESPONSABILITE.—DOMMAGES.

SUPERIOR COURT, Montréal, 29 mai 1858.

Before DAY, Justice.

DUROCHER *vs.* MEUNIER.

Jugé: Qu'un particulier recevant des chevaux dans ses étables est responsable des dommages causés en conséquence de ce que la queue et la crinière d'un cheval dans telles étables ont été coupées, et que, sans preuve du contraire, tels dommages seront présumés avoir été occasionnés par ses serviteurs ou par sa ou leur négligence.

DAY, Justice: This is an action brought by Plaintiff, a medical gentleman at Terrebonne, against Defendant, a tavern-keeper in Montreal, to recover damages by reason of Plaintiff's mare having had its mane and tail shorn in the night, in Defendant's stables. The plea of Defendant sets up that Plaintiff had become obnoxious to many of the inhabitants of Terrebonne, and that many attempts had been made to injure him in his property and to shear his horses; that his horses had, for this reason, been removed to the stables belonging to his neighhour at Terrebonne, and that one Lambert, being well aware of this, and acting in concert with Plaintiff, brought the mare to Defendant's stable, without informing Defendant of the circumstances, so as to enable him either to refuse taking the mare, or if he took her, to demand extra pay so as to secure additional precautions against such attempts: that the injury was done without negligence on Defendant's part, but by accident or force which he could not prevent. This defense, if it be good in law, which perhaps it may not be, is not proved in evidence. The mare was put into Defendant's stable without any thing particular being said. There were certainly no misrepresentations made; the mare is shorn, and the landlord (the Defendant) brings no proof of his allegations. The presumption of law is that the act was done by his own servants, or, at least, in consequence of his or their negligence, and Defendant must be held responsible. There is a good deal of discrepaney in the evidence as to the extent of damages, but I have assessed them at the sum of £20. (9 *D. T. B. C.*, p. 8.)

OUIMET, MORIN and MARCHAND, for Plaintiff.

ROY, EUCLIDE, for Defendant.

VOITURIER.—RESPONSABILITE.

SUPERIOR COURT, Montréal, 28 septembre 1858.

Before SMITH, Justice.

CAMPBELL et al. *vs.* JONES et al.

Jugé : 1° Qu'un voiturier est responsable de la valeur de marchandises livrées par erreur à l'acheteur après avis donné par le vendeur de n'en pas faire la livraison. (1)

2° Que le droit d'arrêter telles marchandises *in transitu*, n'est pas affecté en conséquence de ce que le vendeur, lors de la vente, a pris un billet promissoire pour la valeur des dites marchandises.

SMITH, Justice: This is an action brought to recover the sum of £400, damages, from Defendants, who are forwarders and common carriers, for having wrongfully delivered goods shipped by Plaintiffs. The Plaintiffs, who are merchants at Montreal, sold the goods, of the value mentioned, to one Casper, a merchant at Toronto, and shipped them to his address by one of Defendants' steamers, taking a bill of lading. Before the goods arrived at Toronto, Plaintiffs notified Defendants, at their counting house, in Montreal, not to deliver the goods, and gave them up the bill of lading, and also gave them a letter of indemnity from any claim on the part of Casper against them for stopping the goods. The partner here telegraphs to his partner, at Toronto, not to give up the goods, and receives an answer, that they would be returned. It would appear that another party, a merchant in Montreal, had also sent up goods to Casper by the same steamer, he had also stopped them in the same way, but telegraphed at last to deliver the goods, and the partner at Toronto, as he admits in his *interrogatories sur faits et articles*, delivered the goods sent up by Plaintiffs, by error, he being apparently misled by the telegraphic message from the other Montreal merchant. The pleas of the Defendants set up that they were not legally notified to hold the goods, that they were bound to deliver them to the consignee, and had done so by placing them upon the wharf at Toronto, and that Plaintiffs, who had a branch of their firm at Toronto, should have seen the goods properly stopped there. Moreover, that they had taken Casper as their debtor, and waived any recourse against Defendants. These pleas are not made out. The Defendants were duly notified to stop the goods and bring them back to Montreal. They delivered them by an error for which they must suffer. It is shewn in evidence

(1) V. art. 1675 C. C.

that, at the the time of the sale of the goods, Plaintiffs took Casper's note for the amount of the purchase, but this does not take away their right to stop the goods *in transitu*.

JUDGMENT: "The court, considering that Plaintiffs have "fully established the material allegations of their declaration, "and that the goods, the value of which is now sought to be "recovered from Defendants, were shipped on board the "Ranger" belonging to Defendants, and were delivered by "Defendants to Samuel Casper, after Defendants had been "duly notified to stop the goods *in transitu*, and not to "deliver the goods, and that, by reason thereof, Defendants "are liable, in law, to account for the value thereof £355, 2. 7, "as set forth in the bill of particulars, being the price for "which the goods were sold by Plaintiffs to Casper; doth "condemn Defendants to pay to Plaintiffs the said sum of "£355, 2, 7, etc." (9 *D. T. B. C.*, p. 10, et 3 *J.*, p. 96.)

ROBERTSON, A. W., for Plaintiff.

ROSE and MONK, for Defendants.

SUCCESSION VACANTE.

SUPERIOR COURT, Québec, 18 décembre 1858.

Before MEREDITH, Justice.

THE ATTORNEY GENERAL, pro Regina, *vs.* WILLIAM PRICE, Curator, Defendant, and MCGILL et al., Intervening Parties.

Jugé: Lorsqu'une succession est réclamée à titre de déshérence ou à titre de bâtardise, par la couronne, que les créanciers de telle succession ont le droit d'établir leurs réclamations par procédures en reddition de compte, contre le curateur de la succession, avant que les biens d'icelle succession soient passés en la possession de la couronne. (1)

MEREDITH, Justice: The Defendant is curator to the vacant estate of Peter McLeod, junior, an illegitimate person, who died on the eleventh day of September, 1852; and the attorney general prays that Defendant be condemned to render an account of his administration as such curator, and that all the property, meveable and immoveable, belonging to McLeod's estate, be delivered to the crown, *à titre de déshérence*, or, rather, *à titre de bâtardise*. The honorable Peter McGill, Nathaniel Gould, and Sir John Kirkland, as representing James Dowie, by their intervention, represent that they have claims of various kinds, and to the extent of £50,000, against McLeod's estate; and, pray that the estate may not be deliver-

(1) V. art. 606 et 686. C. C.

ed to the Crown, until they shall have had an opportunity of of establishing their claims, and obtaining satisfaction of them, so far as the estate of McLeod may suffice.

By a deed bearing date the 7th day of November, 1842, executed before MacPherson and his colleague, notaries, as modified by another deed of the 2nd. November, of the following year, a copartnership for the erection of an extensive saw mill at River du Moulin, and the manufacture and sale of deals, was formed between Peter McLeod, junior, of the one part, and William Price and Co., composed of present Defendant and of the honorable Peter McGill, Nathaniel Gould, and James Dowie, of the other part. McLeod put into the concern the claim which he had to the site upon which the mill was to be erected, and also his claims to certain other real estate; and he also agreed to give to the joint concern, which was to be under his care and management, his undivided attention.

In pursuance of this agreement, a saw-mill was built by the parties at River du Moulin, and the manufacture of deals carried on there, upon an extensive scale, until the year 1852, when McLeod died. Sometime before his death, namely, on the 15th November, 1850, a settlement of accounts took place between the River du Moulin concern, and William Price and Co., by which it was established that the former owed the latter £43,110. 1. 6 cy; the settlement bears the signature of Peter McLeod, jr. The large balance thus due by the River du Moulin concern, in 1850, continued, and appeared to increase; and, amounted, on the 15th November, 1853, to £51,515. 8. 10, which sum, with interest, from 31st. March, 1853, appears to be still due by the River du Moulin concern to William Price and Co. In addition to the River du Moulin establishment, of which I have spoken, William Price, individually, and Peter McLeod, junior, as copartners, built another large saw-mill at the Chicoutimi, or Kinogomi River, and carried on the manufacture of deals there also upon a very large scale, until the time of McLeod's death, when it appears the establishment of Chicoutimi, or Kinogomi, was indebted to the establishment at River du Moulin to the extent of £12,850. 16. 8. It appears that a very considerable number of farms and lots of land were acquired in connection with these establishments, and that McLeod took the titles for those properties, in his own name; although they were (it is said) purchased for the benefit of the copartnership of which he was a member, and paid for from the means of those concerns. This may be accounted for by the fact that the whole of the business of the two concerns seem to have been carried on both at the River du Moulin, and Chicoutimi, under the name or firm of Peter McLeod, jr. The outstanding debts, good, bad and doubt-

ful, due to the two concerns amounted, at the time of McLeod's death, to £20,342. 11. 11; the moveable property to £25,115. 15. 6; and the liabilities to £61,860. 11. 5. A few days fter McDeod's death, Defendant was appointed curator to his vacant estate; and he has acted in that capacity until the present time. As to the conclusions of the Crown for an account from the curator, they must of course be granted; but, it does not, therefore follow, that a judgment should at once be rendered, placing the Crown in possession of the whole of the property, real and personal, which appears to form the estate in question. The effect of such a judgment, so far as can now be seen, would be to vest in the Crown, numerous properties which, although held in the name of McLeod, in reality belong to the partnerships of which he was a member; also to make the Crown joint owner with William Price and Co., of the River du Moulin establishment including the wharves and farms connected therewith, and the outstanding debts; also to make the Crown joint owner with William Price, individually, of the Chicoutimi establishment, and all the property, real and personal, connected with it, and, in fine, to make the Crown liable, to the full extent of the property received, for the one half due by McLeod's estate, of the debt due by the River du Moulin concern to William Price and Co., proved to amount to £51,515. 8. 10 cy. It is obvious that a judgment such as prayed for by the Crown would not only subject the creditors of McLeod to the most embarrassing difficulties in the adjusting and enforcing of their claims, but would practically render it impossible for them to have their rights adjudicated upon by the ordinary tribunals of the country; and, in a word, would place the creditors absolutely at the mercy of the Crown. According to the inventory, prepared by Kane, who may be regarded as one of the leading witnesses for the Crown, the debts due by McLeod's estate, or I should rather say by the two concerns in which he was interested as partner, amount to £61,860. 11. 5, I presume this sum includes the whole of the debt due to William Price and Co., by the River du Moulin concern; and as McLeod is liable for one half of that debt only, the liabilities of his estate may be put down at £36,102. 17. 0. All these accounts are of course subject to examination and adjustment; but, for the present, I must speak of the balances as they appear by the accounts before me. To the extent of the debts due by McLeod's estate, £36,102. 17. 0, that estate virtually belongs to the creditors, and a judgment vesting at once the whole in the Crown, would, assuming the estate to be solvent, place the Crown in possession of property to the extent of £36,000 which it could not possibly hold, and would, of course, to the

same extent, place property, in reality belonging to the creditors, not only beyond their reach, but wholly out of their control. That the property, even if now ordered to be delivered to the Crown, would have to come back to the creditors to the extent of their claims, is certain ; but in what manner, or after what delays, expenses and losses, can only be conjectured. The course to be pursued, in order to avoid the difficulties and injustice to which I have adverted, and in order to secure the contingent rights of the Crown, without defeating the actual rights of the creditors, is perfectly simple, and is sanctioned by reason, justice and law. The estate ought to be wound up in the possession of a curator, and under the control of the ordinary tribunals of the country. The assets would then be applied, as far as they may be required, or may suffice, to meet the liabilities ; and the surplus, if any, will be placed at the disposal of the Crown. The objection urged against this course is, that although the present curator may have very important interests, in common with those of the estate which he represents, yet, that he has also interest of great magnitude opposed to those of that estate. I am fully alive to the great importance of this objection ; but, as I am not required to adjudicate upon it in the present case, I abstain from expressing any opinion on the subject. This, however, is certain, that if the objection to which I have adverted be well founded the evil complained of can be remedied without throwing the whole of this extensive and most complicate estate into the possession of the Crown, without any regard to the rights or interests of the creditors. It cannot be necessary to cite authorities to show that the Crown can have no substantial interest in the estate, beyond the surplus, if there be any, after the payment of the debts. The law on this subject is, however, so clearly expressed by Loyseau that I shall quote a passage from his works. That learned author says : " Je tiens pour " certain, que le créancier, encore que simple chirographaire, " se peut adresser pour sa dette entière contre chaque pièce " du bien déféré au fisc, ce que le docte Coquille a tenu en " son institution. (Chapitre des droits de justice.) Mais il n'en " allègue aucune raison : or, la raison est que *onus æris alieni* " *universum patrimonium respicit non certi loci facultates.* " Ce qui est particulièrement décidé à l'égard du fisc *in non* " *possunt D, De jure fisci. Non possunt ulla bona ad fiscum* " *pertinere nisi quæ creditoribus superfutura sunt.*" (1) And Lefèvre de la Planche, in his *Traité du domaine*, vol. 3, p. 71, says : " Il, le créancier, fera prononcer que, tant qu'il n'est pas " payé, le seigneur ne peut retenir aucune partie des effets du

(1) Loyseau, *Des seigneuries*, 12 chap., n° 99, p. 72.

" défunt." The same learned author, after referring to the liability of seigniors, hauts-justiciers, to pay the debts due by estates coming into their possession, says: " Les créanciers " doivent faire créer un curateur aux biens vacants pour faire " leurs poursuites contre lui." This is exactly what has been done in the present case; but to what purpose was a curator appointed, if the crown is now to be allowed to carry off the whole assets, leaving claims to the extent of about £36,000, not only unsatisfied, but unsettled. It may be said that we are to presume the executive council would deal justly with these claims, and are as competent to do so as this court. It may be so, but any error committed by this court can be remedied by the Court of Queen's Bench, and parties aggrieved by the judgment of that court can appeal to Her Majesty in her privy council; whereas, there is practically no appeal from a decision of the executive council. Moreover, the Intervening Parties have a right to have their claims against McLeod's estate adjudicated upon by the judiciary, and not by the executive council. It was, however, contended by the learned counsel for the Crown, that, even if the estate were placed in the possession of the Crown, that the creditors would not be aggrieved as they would still be entitled to a petition of right. In the case supposed, I am inclined to think, the Intervening Parties would have the remedy (such as it is) suggested by the learned counsel for the Crown; but we are aware that the Court of Appeals, in the case of *Laporte* vs. *Principal Officers*, etc., 5 *R. J. R. Q.*, p. 345, were divided in opinion upon the question as to whether Her Majesty's colonial subjects have a recourse or remedy against the Crown by the petition of right. I do not, however, intend to discuss this point, because it needs no argument to show that it would be, in the last degree, unreasonable and unjust, to hand over to the Crown property to which the creditors are now rightfully entitled, in order that they might, afterwards, endeavour to get it back from the Crown by means of the tedious, expensive and cumbrous proceeding known (in theory) as the petition of right; a remedy which has never yet been resorted to in this colony, or in any other colony so far as I know. I will now refer to a few authorities to show that the creditors ought to be afforded an opportunity of enforcing their claims against the estate of their debtor in the possession of the curator; and, as showing also, that the judgment demanded for the Crown in this case would, if rendered at the present time, be as unusual as it would be unjust. Delagarde, in his *Traité des droits du souverain en France*, page 307, says: " Le droit de *déshérence* " en France est annexé à la haute-justice, et c'en est un fruit " qui, par la grâce de nos rois, est accordé aux seigneurs parti-

" culiers pour en jouir dans l'étendue de leurs hautes-justices." P. 310: " Le seigneur doit faire nommer un curateur à la succes- " sion vacante sur lequel il se la fait adjuger, et faire inven- " taire avant de s'immiscer." P. 313 : " Les créanciers de ceux à " qui appartenaient les héritages adjugés au roi ou au seigneur " haut-justicier, par déshérence, doivent commencer par obtenir " une sentence avec le procureur du roi ou le procureur du " seigneur, portant qu'ils seront payés sur les biens en ques- " tion. Ensuite, ils feront créer un curateur aux biens, autre " que celui dont il est parlé ci-devant, et concluront que la " sentence obtenue contre le procureur du fisc soit déclarée " exécutoire contre le nouveau curateur ; ce faisant, qu'il soit " condamné à leur payer, etc., et, après avoir obtenu une sen- " tence contre ce procureur, ils feront procéder à la saisie, " criée, vente et adjudication sur lui, dans les mêmes formes " que celles prescrites dans les ordonnances, pour les autres " saisies, criées, ventes et adjudications par décret sur les " débiteurs ordinaires." I am well aware that, in some parts of France, the Crown could exercise the *droit de déshérence* without the nomination of a curator ; and, this on the ground that, " Les procureurs du roi sont curateurs nés des biens " vacants." (1) But the authorities on this point do not militate against those which establish that the claims of the creditors are to be established, aud satisfied, by means of proceedings against a curator appointed to the estate of their deceased debtor. Chopin, *Traité du domaine,* livre 1, tit. 12, says: "Mais lorsque tels biens vacants sont acquis au seigneur " haut-justicier, les créanciers doivent songer à demander qu'il " soit créé un curateur aux dits biens, afin qu'ils fassent les " poursuites en jugement pour la conservation de leurs droits " et hypothèques ; et pour faire procéder aux criées et vente " publique, et à l'encan, jusqu'à ce qu'ils soient satisfaits ; ce " qui ne doit point être fait à la diligence et instance du " seigneur haut-justicier, ou du roi, et de son procureur." The author then explains what the proceeding was, in such cases under the roman law : and, after citing numerous authorities from that system, continues as follows : " Or il est plus apparent " et raisonnable que les biens vacans d'un défunt soient mis " en vente et criés à l'instance du créancier, et adjugés publi- " quement, en son nom, que sous celui du seigneur haut-jus- " ticier, auquel ils ont été déférés, d'autant qu'il n'a pas créé " les dettes, et n'a pas même fait les hypothèques, n'y engagé " tels biens aux créanciers pour ses affaires propres et à son " profit." At page 82, Lefèvre de la Planche refers to the opinion of Loyseau, with respect to estates which have been

(1) *Répertoire de jurisprudence*, vol. 5, p. 537 ; Bosquet, vol. 1, p. 51.

renounced by the presumptive heirs, and then adds: " Il est " vrai qu'il ajoute, qu'ayant été abandonnés à cause des charges, " *on ne trouvait pas bon que le seigneur s'en mis en possession* ; " et qu'on les fait régir par un curateur ; mais il n'en résulte " pas moins de son sentiment que le droit appartient au fisc ; " et que si on en suspend l'effet, ce n'est que pour empêcher " que sa présence *ne trouble les créanciers légitimes, et n'aug-* " *mente les longueurs et les frais, par le concours d'un nouvel* " *adversaire.*"

The same author, in a note at the same page, observes: " Les " principes de cette seconde espèce de déshérence, qui n'est " nullement différente de la première, sont infiniment simples ; " et toute la difficulté consiste dans *la nécessité de modérer* " *leur exécution de manière qu'ils ne produisent pas de* " *vexations aux citoyens.*" Having shewn that the creditors have a right to enforce their claims by proceedings against the curator, I will now briefly notice some of the objections urged against the intervention. In the first place, it was contended that the Crown has the same right to be placed in the possession of an estate, such as that now in question, as a legal heir has to obtain the possession of the estate of his ancestor. But the authorities shew that the Crown, in this matter, is not in the position of an heir. Berthelot du Ferrier, in his " *Traité des droits et des domaines du roi,*" p. 115, says: " Cependant, il faut remarquer que, quand une personne " décède sans héritiers, ses biens *non vocantur hæreditas sed* " *bona vacantia nominantur*, ainsi le curateur créé à ces " biens ne représente pas l'héritier, parce qu'il n'y en a point ; " mais la personne du défunt. En sorte que le roi, ou le sei- " gneur haut-justicier qui succède, par droit de déshérence, " n'est pas héritier du défunt, mais successeur de ses biens." And Chopin says: " Les seigneurs des lieux ne sont pas pre- " prement héritiers du défunt, mais possesseurs des biens par " droit de vacance." The Crown, in a word, takes property, *à titre de déshérence*, or *à titre de bâtardise*, because, there is no other owner; but where, as in the present instance, there are creditors, they are, in effect, the owners of the estate to the extent of their claims; and the proceedings against the curator are merely the formalities necessary to give the creditors the full benefit of that which rightfully is their own property.

The intervention on the part of McGill and others, was also represented by the learned counsel for the Crown, as an extraordinary proceeding; but, it appears to me to have been rendered absolutely necessary, by the demand of the Crown to be placed in possession of property which in effect belongs to the creditors, without making any provision for the satisfac-

tion of their claims. By proceeding as they have done, the Intervening Parties have afforded the Crown the most ample opportunity of scrutinizing their claims; and it will be recollected that according to the passage quoted from Delagarde," les créanciers doivent commencer par obtenir " une " sentence, avec le procureur du roi, ou le procureur du " seigneur; " which is nearly as possible what has been done in the present instance. In fine, in this matter, it is to be recollected that the Crown, claiming as it does, property for which it has given nothing, *certat de lucro captando*, whereas the creditors merely seek to get their own property; and to avoid loss *certant de damno vitando*. The creditors are, therefore, in a more favorable position than the Crown; and the Crown, in the exercise of the rights of McLeod, ought not to be allowed to defeat, or impair, or even to retard the enforcement of the just rights of McLeod's creditors. When these considerations are borne in mind, the foregoing authorities, tending to show that the right of the Crown, as successors *à titre de déshérence*, ought to lie suspended, so far as may be necessary," pour empêcher que sa présence ne trouble les cré- " anciers légitimes, et n'augmente les longueurs et les frais par " le concours d'un nouvel adversaire," and that the enforcement of the rights of the Crown ought to be moderated," *de manière " qu'ils ne produisent pas de vexations aux citoyens*," must appear nothing more than reasonable and just. Guided by these reasons and authorities, I have no hesitation in saying that the Intervening Parties, as creditors of McLeod, must be afforded an opportunity of making good their claims against his estate, before it can be placed beyond their reach, by a transfer to to the Crown; and, therefore, for the present, confine my judgment in favour of the Crown, to an order for an account; and, at the same time, order Defendant, a curator, to render to the Intervening Parties such an account, as McLeod, if living, would have been bound to render. As to the remainder of the conclusions, as well of the principal demand, as of the incidental demand, the court reserves to adjudicate upon them until the accounts ordered shall have been rendered. (9 *D. T. B. C.*, p. 12.)

ANGERS, for Plaintiff.

STUART, OKILL, Q. C., for Defendant.

BLACK, Q. C., for Intervening Parties.

SUBSTITUTION.—FILS AINE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 13 sept. 1858.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL and CARON, Justices.

McCARTHY, Appellants, *vs.* HART, Respondent.

A légua certaines propriétés à B avec substitution, au décès de B, en faveur de son fils aîné, ce fils aîné mourut sans enfants avant B lui-même.

Jugé : **1° Qu'un fils de B survivant quoique puisné, avait droit de réclamer en vertu de la substitution, comme fils aîné.**

2° Qu'une vente des propriétés en question par B et son fils aîné décédé, était nulle, en autant qu'il s'agissait de la réclamation du fils survivant de B en vertu de la substitution ; cette substitution ne prenant effet qu'à la mort de B.

This was an appeal from a judgment rendered in the Superior Court, sitting in the district of Three-Rivers, in December last, in a petitory action instituted by Respondent against the estate of Moses Hart. The action was brought under the will of Aaron Hart, made at Three-Rivers, on the 11th December, 1800, and containing the following legacy : " 1° Donne et lègue le testateur à Benjamin Hart, son " troisième fils, un hangar à deux étages, etc., pour par le léga- " taire en jouir sa vie durante seulement, la propriété étant " réservée à son enfant mâle aîné, issu en légitime mariage, " et, au cas de non enfant, la dite propriété substituée tel que " mentionné aux legs du troisième et quatrième article du " présent testament." The testator died on the 28th December, 1800, leaving four sons, Moses, Ezekiel, Benjamin and Alexander Hart. The declaration alleged the marriage of Benjamin Hart, on the 1st. April, 1806 ; and a sale of the property in question by him and his eldest son, Aaron Philip Hart, in the year 1832, to Moses Hart, and the death of the latter in 1852, who bequeathed the property so purchased by him to the present Appellant, and others, who continued to remain in possession of the same until the institution of the action to dispossess them thereof. The declaration then alleged the death of Aaron Philip, Benjamin Hart's eldest son, in 1843, and subsequently, the death of Benjamin Hart himself, in the year 1855, when Respondent brought his action to recover the property in question, alleging that the substitution in the above clause of the will, only opened at the death of his father Benjamin Hart, and that therefore, he, Respondent, was his father's eldest son at the time the substitution opened, although he was only the second in point of birth, and that he was therefore entitled to the property ; and that the sale

made by his father and elder brother in 1832, was null and void, inasmuch as the property was not vested in them at the time of the sale, and inasmuch as the substitution could not open, nor the property vest in any one, until the death of his father. The Appellant pleaded: 1° The sale above mentioned, by Benjamin and his eldest son, Aaron Philip Hart, and tradition thereon, to Moses Hart, in the year 1832, prescription of ten years, and of twenty years; 2° That, in virtue of this sale to Moses Hart, and the latter's bequest to Appellant, she, the Appellant, represented Aaron Philip, Benjamin Hart's eldest son, and was entitled to the property under the substitution in the above clause of Aaron Hart's will. The judgment of the court below, maintained the action, on the ground that Aaron Philip Hart, the eldest son of Benjamin Hart, having died without issue, during the lifetime of his father, and before the substitution was legally open, he, Respondent, after the decease of his elder brother, Aaron Philip Hart, and the decease of his father, Benjamin Hart, was, with respect to the substitution, to be legally considered as the eldest son, and as such entitled to the property in question, was null and void, to all intents and purposes, and could not operate as a bar to the claims of Respondent, as such eldest son of Benjamin Hart, at the time of the latters' decease.

STUART, A., for Appellant, contended that there was no legal proof of the marriage of Benjamin Hart; that it was pretended that he married at New-York, in the United States, and that the only proof of this marriage was the affidavit of one Lyons; that this was not sufficient evidence of the marriage; that the marriage should be proved to have been made in accordance with the form of Jewish marriages, Benjamin Hart being a Jew, and, moreover, that the proof of a marriage, in a foreign country, ought to be the same as required in the country in which the marriage took place. (1)

That assuming the marriage, and the other facts of the case sufficiently established, he contended that there was a misapprehension of law in the construction of the legacy. That the bequest of Aaron Hart, was the usufruct of the property in question to his son Benjamin, and the property to his grandson, Benjamin's eldest son, and in the event of his having no son, then a substitution in favor of other branches of the family; that, therefore, the instant that Aaron Philip Hart was born, the property vested absolutely in him, and the sale by him, conjointly with his father, Benjamin Hart, who had the usufruct, vested the property and the possession in Moses

(1) Rosco on Ev., p. 360; Waddells' Eccles. Law, p. 232; 1 Campbell's Repts, p. 60.

Hart, the purchaser; that the court below was in error in confounding the legacy of the usufruct to one, and the property to another, with a substitution. (1)

BARNARD, for Respondent, contended that it would be found that the proof of the marriage was sufficient, and was so held by the court below, under the peculiar difficulties which persons of the Jewish persuasion labored in this country, as well as in the United States, respecting proof of marriage at the time Benjamin Hart married. That, with respect to the other and principal point in the case, there could be no doubt that Aaron Philip Hart, having died before his father Benjamin Hart, and, consequently, before the substitution opened, Respondent, the second son in point of birth, was entitled to the benefit of the substitution by operation of law as the eldest son. (2)

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef : Le testament de feu Aaron Hart, fait dans la ville des Trois-Rivières, où le testateur avait son domicile, contient la clause suivante : 7° " Donne et lègue le dit sieur testateur à Benjamin Hart, son " troisième fils, un hangar à trois étages, etc., pour, par le dit " légataire, en jouir, sa vie durante seulement, la propriété " étant réservée à son enfant mâle aîné, issu en légitime ma- " riage, et, au cas de non-enfant, la dite propriété *substituée* " tel que mentionné aux legs du troisième et quatrième ar- " ticle du présent testament." Ces deux articles 3 et 4 doivent donc servir à expliquer le 7e dont il s'agit. Par le troisième, il lègue à Moses Hart, son fils aîné, tous ses droits dans les fiefs Sainte-Marguerite et Dusablé " pour, par le dit Moses Hart, en jouir en usufruit, sa vie durante seulement, la propriété desquels fiefs et droits y annexés, sera et appartiendra à l'enfant mâle aîné, issu en légitime mariage du dit Moses Hart, et, au cas que Moses Hart décéderait sans enfant mâle, né ou à naître en légitime mariage, le testateur veut et ordonne que la propriété des dits fiefs, et de tous les droits y afférents soient transmis à l'enfant mâle né en légitime mariage de Ezekiel Hart, et, au cas de mort de ce dernier sans enfant mâle, né ou à naître de son mariage, la propriété des dits fiefs ainsi que des droits appartenants, passera entre les mains de l'enfant mâle né en légitime mariage de Benjamin Hart, etc." (3e fils

(1) 2 Bourjon, p. 153 ; 5 Toullier, p. 53, n° 41 ; Delincourt, vbo *Immeuble*, p. 47 ; Ancien Denisart, vbo *Substitution*, p. 579, n°s 1, 16 ; 12, Dalloz, pp. 155, 188, 190, 195, vbo *Substitution*.

(2) 1 Bouchel, p. 101 ; 3 Prost. de Royer, p. 675, n° 1 ; 2 Coquille, qu. 257 ; 1 Bourjon, p. 825, n° 30 ; Ancien Denisart, vbo *Aîné*, Nos 44 et 91 ; Ib., vbo *Substitution*, pp. 580, 590 ; 1 *Répertoire*, pp. 376, 378 ; 2 *Dict. de droit*, pp. 972, 973 ; Nouveau Denisart, p. 390, sec. 9 ; Ferrière, *Grand Coutumier*, p. 427.

du testateur.) Puis après une semblable disposition quant à l'enfant mâle d'Alexander Hart (4e fils du testateur), il est dit : " en cas de mort de ce dernier, sans enfant mâle né ou à naître de son mariage, la propriété des fiefs et de tous les droits y annexés, *sera enfin substituée* à la fille aînée la plus âgée issue du mariage des dits Moses, Ezekiel, Benjamin et Alexander Hart, auxquels les dits biens demeureront *substitués* l'une à l'autre dans les dits cas, avec cette défense par le testateur, qu'il, Moses Hart, usufruitier des susdits fiefs et de tous les droits y annexés, ne pourra, en aucune manière, vendre, engager, et aliéner et hypothéquer les dits fiefs, la propriété étant réservée comme il est dit. Le 4e article du testament contient un legs *semblable* du fief Bécancour qui est donné en premier lieu au second fils, Ezekiel Hart, puis successivement aux autres fils du testateur, aux mêmes termes et conditions que dans le troisième article. Il est évident que les troisième et quatrième articles portent substitution, d'abord en faveur d'un enfant mâle, puis, à défaut d'un tel enfant, en faveur de " la fille aînée la plus âgée du mariage de Moses, Ezekiel, Benjamin et Alexander Hart," les quatre fils du testateur ; il est encore bien évident que le testateur a voulu que la substitution ne profitât à cette fille que dans le cas où il n'y aurait pas, à la mort du grevé, d'enfant mâle d'aucun de ses fils. Prenons le 3e article, aux termes duquel les fiefs Sainte-Marguerite et Dusablé doivent appartenir d'abord " à l'enfant mâle aîné issu en légitime mariage de Moses Hart, et au cas que Moses Hart décéderait sans enfant mâle né ou à naître en légitime mariage," alors à " l'enfant mâle né en légitime mariage de Ezekiel Hart, " etc. Il me semble clair que celui des enfants de Moses Hart qui doit recueillir, doit être un enfant mâle, vivant à son décès ; car c'est alors que la substitution doit s'ouvrir au profit de cet enfant, que cet enfant ait eu un frère aîné prédécédé, ou n'en ait pas eu. Il suffira donc à cet enfant pour recueillir, qu'il se trouve être l'aîné des enfants mâles de Moses Hart, vivants à son décès, ou bien le seul enfant mâle vivant alors. Le système contraire est insoutenable ; il conduirait même à des conséquences absurdes, comme on peut s'en convaincre par l'hypothèse suivante. Supposons que Moses Hart ait eu deux enfants mâles en légitime mariage, et que l'aîné soit mort avant lui. Dans le système des Appelants, le second de ces deux enfants, survivant à son père, ne pourra pas recueillir, parce qu'il aura eu un frère aîné. Cependant celui-ci n'aura lui-même rien recueilli, parce qu'il sera mort avant son père. Qui recueillera donc en pareil cas ? Ce sera ou un enfant mâle ou une fille, ou d'Ezekiel, ou de Benjamin, ou d'Alexander Hart, peut-être même une fille de Moses Hart le grevé, et, cependant celui-ci aura laissé un enfant mâle ! Nous voilà

donc, dans ce système, en pleine contradiction avec les termes du testament, et en pleine opposition à l'intention du testateur. Que l'on remarque encore que la condition est : " si Moses Hart décède sans enfant mâle né ou à naître ; " s'il laisse un enfant mâle même à naître, la condition est donc remplie, et cet enfant est donc appelé, et le seul appelé, bien qu'il ait pu avoir un frère aîné, mais qui serait prédécédé. Il faut donc appliquer le même raisonnement au legs particulier dont il s'agit en cette cause, et qui forme le 7e article du testament. Ce legs porte substitution au profit de celui des enfants mâles de Benjamin Hart, qui, au décès de leur père, se trouvera être le plus âgé, encore qu'il ne soit pas le premier né. L'Intimé est dans ce cas ; il avait un frère aîné, il est vrai, Aaron Philip Hart, mais ce frère aîné est mort longtemps avant son père. Le testateur, après avoir fait un grand nombre de legs particuliers, avait nommé ses quatre fils ses légataires universels, et choisi pour exécuteurs testamentaires ses deux fils Moses et Ezekiel et Robert Lester, qui comprirent si bien que le testament portait substitution, qu'ils le firent publier en justice deux mois après la mort de son auteur. Le dernier moyen invoqué en appel, et qu'il me reste à noter, est qu'il n'y a pas de preuve suffisante du mariage de Benjamin Hart et de la naissance de ses deux fils. A mes yeux, cette preuve est complète. Le testateur, ses fils et leurs familles appartiennent tous à la religion judaïque. Ce n'est qu'en 1829 qu'un acte de la législature du Bas-Canada (9 Geo. IV, ch. 75), a permis aux Juifs d'avoir des registres authentiques pour constater leur état civil : " Tout ministre de la religion judaïque," porte la 7e section, " tiendra un registre en duplicata de tous actes de mariage et de toutes naissances et sépultures, etc." Puis il est déclaré que toutes les dispositions de notre statut de la 35 Geo. III, ch. 4, concernant les registres de l'état civil, s'appliqueront aux registres tenus sous l'autorité de ce nouvel acte (sec. 7 et 8). Or l'acte de la 35e Geo. III, porte (sec. 13), " que, dans tous les cas où les registres d'aucune paroisse, église protestante ou congrégation, ne pourraient se trouver ou qu'il n'en aurait pas été tenu, rien dans cet acte ne sera censé s'étendre à empêcher de faire la preuve des baptêmes, mariages et sépultures, tant par témoins que par papiers ou registres de famille, ou par autres moyens accordés par la loi réservant aux parties adverses le droit de détruire ou réfuter telle évidence." Les Juifs, sujets britanniques, doivent avoir tout le bénéfice de cette loi, d'autant plus que l'acte déclaratoire de la 1ère Guil. IV, ch. 57, reconnaît qu'ils " ont droit, et seront censés, considérés et regardés comme ayant droit à tous les droits et privilèges des autres sujets de Sa Majesté, ses héritiers et successeurs, à toutes intentions, interprétations et fins quelconques, etc." Il

est prouvé, dans la cause, qu'il n'y avait pas aux Trois-Rivières de registres de l'état civil des personnes professant le judaïsme ; l'Appelante, Mary McCarthy, en a elle-même donné une admission formelle dans la cause. De là, la nécessité dans laquelle s'est trouvé Benjamin Hart d'aller à New-York, faire constater devant un ministre de sa congrégation religieuse, la naissance de ses enfants. Il y en a un certificat dans la cause, donné même sous serment, le 31 mars 1857, par le Révérend M. Lyons, se disant " the minister of the congregation Sheareth Israel, in the city of New-York," et avoir en cette qualité la garde des registres de naissances, mariages et sépultures, appartenant à cette congrégation. Ce certificat contient un extrait de ces registres, lequel constate le mariage de Benjamin Hart, à New-York, avec Judith Harriet Hart, la déclaration que de ce mariage étaient nés, aux Trois-Rivières, deux fils, savoir Aaron Philip, le 29 juin 1811, et l'Intimé, le 8 avril, 1813. L'Appelante a prétendu que ce certificat n'était pas conforme à ce qu'exige notre statut de 1853, ch. 19. Il me semble au contraire qu'il en remplit toutes les conditions, et que, par conséquent, il doit faire preuve de son contenu *primâ facie*. C'était à l'Appelante à en nier formellement la vérité, par écrit au désir de la 7e section, ce qu'elle n'a pas fait ; mais en supposant que ce certificat serait défectueux, la preuve des faits dont il s'agit, n'en serait pas moins suffisamment établie par d'autres parties du dossier. A l'acte de vente du 7 septembre 1832, que Benjamin Hart a fait du terrain en question à son frère Moses Hart, est intervenu Aaron Philip Hart. Il est vrai qu'il n'y est pas dit qu'il est le fils de Benjamin, mais il y intervient pour garantir la vente avec son père. Quel motif aurait donc eu l'acheteur, son oncle, de le faire ainsi intervenir, s'il n'avait pas été son neveu, alors le fils aîné du vendeur ? Moses Hart devait connaître les enfants de son frère, et en faisant intervenir ainsi Aaron Philip Hart à l'acte de vente, il le reconnaissait par cela même pour être alors le fils aîné de son frère, et habile à recueillir l'héritage substitué, s'il venait à survivre à son père C'est encore pour se prémunir contre l'événement, par le prédécès du dit Aaron Philip Hart, de l'ouverture de la substitution au profit d'un autre enfant mâle de Benjamin Hart, que l'acheteur Moses a stipulé qu'il ne paierait le prix de vente que quand le vendeur serait prêt à l'employer à l'acquisition d'un autre terrain avec le titre de bailleur de fonds à son profit. Il y a là, de la part de Moses Hart, une reconnaissance du mariage de son frère Benjamin, et de la naissance de son fils Aaron Philip ; et une telle reconnaissance fait preuve contre les Défendeurs, représentants de Moses Hart, et ce d'autant plus que l'Appelante elle-même invoque le susdit acte de vente, par son exception péremptoire.

Il y a plus, c'est que ce mariage et cette naissance sont admis par Mary McCarthy dans la seconde partie de son exception. Voici comme elle s'y exprime : " la dite Mary McCarthy, en sa qualité, dit de plus, que Aaron Philip Hart, écuyer, avocat, de la cité de Montréal, était et est l'enfant mâle aîné, issu du légitime mariage de Benjamin Hart avec Harriet Judith Hart, ces deux derniers nommés en la déclaration du Demandeur."

Dumoulin, ancien notaire, dit dans son témoignage : " Je sais que Benjamin Hart, après son mariage à New-York avec Harriet Judith Hart, est venu demeurer aux Trois-Rivières, et a eu plusieurs enfants dont Aaron Philip était l'aîné, et Arthur Wellington (l'Intimé), était le cadet. Toute la famille de Benjamin Hart était juive." Il y a preuve authentique que Aaron Philip Hart est décédé avant son père, étant mort en 1843, et son père seulement en 1852. L'on trouve dans la cause deux affidavits faits par Caroline et Adolphus M. Hart, enfants d'Ezekiel, à l'effet qu'Aaron Philip Hart était décédé avant son père, et que l'Intimé était à la mort de celui-ci, le plus âgé de ses fils ; qu'il était d'usage pour leur père, et pour Benjamin Hart, de conduire leurs enfants des Trois-Rivières à la ville de New-York, peu de temps après leur naissance, afin de faire inscrire leurs noms sur le registre de la congrégation judaïque dans cette ville. Il est vrai que ces deux personnes sont les cousins-germains de l'Intimé, mais les Défendeurs n'ont pas fait rejeter du record ces affidavits. Du reste, la preuve de l'Intimé est suffisante sans ces affidavits. Trois des Défendeurs ont même admis par écrit que l'Intimé était en effet le fils aîné de Benjamin Hart. Sur le tout, je trouve les faits de la cause suffisamment établis, et je suis d'opinion que le jugement dont est appel devrait être confirmé. (9 *D. T. B. C.*, p. 23, et 3 *J.*, p. 29.)

STUART and VANNOVOUS, for Appellants.

LAFLAMME, LAFLAMME and BARNARD, for Respondent.

SAISIE D'IMMEUBLES.

QUEEN'S BENCH, APPEAL SIDE, Québec, 13 décembre 1858.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL and CARON, Justices.

ARNOLD, Appellant, and CAMPBELL, Respondent.

Le Demandeur ayant fait émaner exécution sur un jugement obtenu contre le Défendeur dans une action hypothécaire, ce dernier dit à l'officier chargé du writ d'exécution, qu'il n'avait point de meubles ; sur ce, cet officier fit la saisie des immeubles du Défendeur, et notamment de la propriété hypothéquée, et fit rapport de la déclaration du Défen-

deur qu'il n'avait pas de meubles. A cette saisie, le Défendeur fit une opposition à fin d'annuler, demandant la nullité de la saisie, sur ce que, au temps d'icelle, il avait des meubles que le shérif aurait dû saisir avant de saisir ses immeubles:

Jugé: Que telle opposition doit être renvoyée sur une défense en droit, le Défendeur n'ayant pas d'abord, dans sa dite opposition, nié les allégués du rapport du shérif, dans lequel il rapportait que le Défendeur avait déclaré n'avoir point de meubles. (1)

Respondent recovered judgment against Appellant, in an hypothecary action instituted against him, as the possessor of real estate which he held as the legatee of his father, the late George Arnold, the debtor who mortgaged it. The terms of this judgment were, "condamne en conséquence le Défendeur, "comme détenteur du dit immeuble, à payer au dit Archibald "Campbell la somme de £1109, 18, avec intérêt sur mille louis "à compter du douze septembre 1848, jusqu'au parfait paie-"ment, si mieux n'aime le Défendeur, James Arnold, abandon-"ner et délaisser en justice, sous quinze jours de la significa-"tion du jugement, le dit immeuble, pour icelui être vendu "suivant la loi, et à défaut par Arnold de faire le délaisse-"ment, la cour le condamne personnellement à payer la dite "somme, avec intérêt et dépens." The Appellant not having complied with the terms of the judgment, Respondent issued execution, and the sheriff made a return of *nulla bona.* An alias writ issued in the usual form against the goods and chattels, lands and tenements of Appellant, when Appellant, after having refused to pay the amount of the judgment, told the sheriff's officer, charged with the writ, that he had no moveables, and thereupon, the officer seized his immoveables, being the property hypothecated in favor of Respondent, and his *procès-verbal* of seizure set forth the refusal of Appellant to pay, and his declaration that he had no moveable property. The Appellant then filed an *opposition à fin d'annuler,* in which he swore that, at the time of the seizure of his immoveable property in question, he was possessed of moveable property to the value of £103. 10. 6., a statement of which was filed with the opposition, and prayed to have the seizure of his immoveable property declared null and void, in as much as his moveable property had not been previously seized and taken in execution. To this opposition Respondent demurred, on the ground, that execution having issued against Appellant, as *détenteur* or possessor of the real estate seized, in consequence of his not having paid the amount for which judgment was rendered against him, nor exercised, within the time prescribed by the judgment, his option to abandon the real estate, it was competent for Respondent to take the real

(1) V. art. 554 C. P. C.

estate in execution, without previously discussing his personal estate or moveables.

TASCHEREAU, J. T. for Appellant, contended that the judgment was erroneous; that, in the court below, he had demurred to the conclusions of Plaintiff's declaration, on the ground that they asked for a condemnation for the amount claimed, unless Defendant preferred to abandon the property, instead of praying for a condemnation to abandon the property, unless Defendant preferred paying the amount; and that the court below, while dismissing his demurrer, had, nevertheless, not awarded costs against him, thereby admitting to a certain extent the correctness of the conclusions of the demurrer, and yet the judgment on the merits condemned Defendant, in the terms of the conclusions of the declaration, for it condemned him personally as to the costs; and the pretension of Appellant was that there can be no personal condemnation in hypothecary actions, and this was the question which the court was called upon to decide. The judgment ought to have condemned Defendant to abandon the property, unless he preferred paying the amount. That the judgment of the court below was equally erroneous in dismissing Defendant's opposition, inasmuch as, by our law, the immoveable property of a Defendant could not be seized until after his personal property had been discussed; (1) and the sheriff having seized the immoveable property of Defendant before seizing his personal property, the seizure was consequently null and void; and Defendant's opposition ought to have been maintained.

STUART, G. OKILL, Q. C., for Respondent, argued, that the hypothecary action being *in rem*, the property affected by it could be proceeded against; that it made no difference whether Defendant were condemned to pay, or abandon the property, or whether he was condemned to abandon or pay, both amounted to the same thing, inasmuch as by both he had the option, that of either paying the amount or abandoning the property. With respect to the opposition, it was merely an attempt on the part of Defendant to impose upon the court and to profit by his own fraud, for it appeared by the sheriff's return that Defendant himself had told the officer charged with the writ that he had no moveables, and then after having misled the bailiff, he wanted to profit by his own deceitful act, and to set aside the seizure on the ground that he had moveables which the sheriff should first have seized; that, even if this act of fraud had not been practised by Appellant, Respondent was not bound first to discuss his

(1) 25, Geo. III, cap. 2, sec. 31.

moveables in the case of an hypothecary action; (1) that this doctrine would be found to be in accordance with the law of France. (2) That the object of Appellant was quite apparent; it was to produce a lot of articles of little value and cause a delay in order to bring them to sale, while he would, in the mean time, remain in possession of the property drawing a large revenue from it; that Respondent was not bound to accept payment of his claim in part; he was entitled to the whole, and if he could be kept out of his claim until a few articles were sold, which Appellant himself only valued at £103, he would be compelled to accept his claim piecemeal or remain unpaid altogether.

CARON, Justice, dissentiente: I differ from the majority of the court. There are two points in the cause which, though not pressed at the argument, yet, ought, I think, to be alluded to: 1° that there is not sufficient ground alleged in the opposition to justify the court in maintaining its conclusions. I am of opinion that there is quite enough alleged in the opposition to justify the conclusions; it sets forth that the sheriff seized the immoveable property of Opposant, although he had moveables at the time, which by law the sheriff was bound to seize before he could attach his immoveables; now, this is an important allegation, and one which Opposant ought to have been allowed to prove; Plaintiff ought to have pleaded *au fond* to this allegation; and if Defendant proved it, he would certainly have been entitled to the conclusions of his opposition. The second point is, that the judgment was for £1100, and the moveables were only valued at £103. now this is an important question and involves the principle as to whether a creditor must dicuss the moveables of his debtor before he can proceed against his immoveables. In France, the law was only positive as to minors in this respect, but the french law in this particular has been superseded in this country by statute law, which makes it imperative on the sheriff to dispose of the moveables before he sells the immoveables; (3) this statute is positive in its terms, and does not give the sheriff the discretion to proceed against the moveables first, only in cases where they will be sufficient to satisfy the full amount of the judgment, it says, he shall sell them, whether such moveables are sufficient or insufficient for that purpose, and this is a wise and equitable provision of law, inasmuch as it gives a Defendant a short delay during which perhaps he might be able to obtain the means of satisfying the judg-

(1) 12 Vic., cap. 38, sec. 70.

(2) Pothier, *Hypothèque*, art. préliminaire, et chap. 2, sect. 3 et 5.

(3) 25 Geo. III, cap. 2, sec. 31.

ment and thereby save his property; and again, although, as in this case, the moveables were only worth £100, yet, even this deduction would be an object to a Defendant, inasmuch as he could more easily obtain a loan of £1000 than of £1100. In short, I hold that the law allows the sheriff no discretion, he must dispose of the moveables first, no matter what their value is; of course, I do not pretend that if the moveables were all but valueless that he would be bound to sell them first, I mean of course a reasonable discretion, not to sell articles of so little value that the effect would only be to increase the costs against the Defendant; in all other cases he is bound to discuss the moveables first, and, as I pretend, should have done so in the present instance.

Sir L. H. LaFontaine, Bart., Juge-en-Chef: Le 18 mars 1857, le Demandeur obtient contre le Defendeur un jugement en déclaration d'hypothèque pour la somme de £1109. 18. 8, avec intérêt sur £1000, à compter du 12 septembre 1848, et les dépens taxés à £20. 3. 8, avec l'alternative ordinaire *si mieux n'aime délaisser, etc.* Le jugement est signifié au Défendeur personnellement le 27 du même mois. Le 19 juin suivant (le Défendeur n'ayant pas fait de délaissement), le Demandeur fait émaner un bref d'exécution, par lequel il est enjoint au shérif d'en prélever le montant, " of the goods and chattels, lands and tenements of James Arnold." Le 25, le shérif fait le rapport suivant, au dos de ce bref: " The within named Defendant hath not to my knowledge any goods or chattels within my district, whereby I can levy the amount of this writ or any part of the same." Le 4 juillet, le Demandeur fait émaner un nouveau bref d'exécution dans les mêmes termes ci-dessus cités du premier, lequel bref est rapporté le 10 novembre, avec la déclaration suivante du shérif: " The within named Defendant hath not to my knowledge any goods or chattels within my district, whereby I can levy the amount of this writ, or any part of the same; I have in consequence seized the lands and tenements of Defendant, as described in the procès-verbal of seizure hereunto annexed, which I am advertising according to law, but now return this writ by reason of the opposition *à fin d'annuler* of Defendant herewith filed." L'immeuble saisi est celui-là même qui est, par le jugement du 18 mars 1857, déclaré être hypotéqué.

La saisie en a été faite le 6 juillet 1857, par l'huissier Richard dont le procès-verbal accompagne le rapport du shérif. Dans ce procès-verbal de saisie, l'huissier, après avoir constaté le refus du Défendeur de payer le montant de la condamnation sur le commandement qu'il lui en avait fait, certifie ce qui suit: " à ce refus je lui ai déclaré que j'allais saisir et exécuter ses meubles et effets, mais James Arnold n'ayant déclaré n'avoir

aucuns meubles ou effets mobiliers, je lui ai déclaré que j'allais saisir ses immeubles, comme, de fait, j'ai pris, saisi et mis sous la main de la reine et justice ce qui suit," savoir (le susdit immeuble). Par son opposition, le Défendeur demande que la saisie de l'immeuble soit déclarée nulle, parce que, dit-il, il était, au temps de la dite saisie, propriétaire et en possession de meubles et effets mobiliers d'une valeur excédant cent louis ainsi qu'il appert par l'état annexé contenant en détail une liste d'une partie des dits effets, et que le shérif n'avait pas le droit de procéder à la vente du dit immeuble sans avoir au préalable disposé de ses meubles. Dans l'état en question, les effets qui y sont mentionnés sont évalués par le Défendeur à la somme de £103. 10. 6. L'opposition a été contestée par le Demandeur par une défense au fonds en droit; et sur cette contestation est intervenu, le 5 avril 1858, le jugement dont est appel. Ce jugement maintient la défense en droit, et déboute le Défendeur de son opposition; " considering," y est-il dit," that the reasons alleged in support of the said *défense au fonds en droit* are sufficient to warrant the conclusions thereof, and that the said *défense au fonds en droit* is well founded in law." Les raisons assignées par écrit au soutien de la défense en droit, étaient celles-ci : " 1° Because it appears by the writ and declaration, that the action instituted by Archibald Campbell against James Arnold, and upon which the judgment hath been rendered, was an action *en déclaration d'hypothèque;* and that by the judgment James Arnold was condemned, as *détenteur* of a real estate which is the same lot of land and premises seized and taken in execution. 2° That the writ of execution having issued upon the judgment so rendered in an action *en déclaration d'hypothèque,* and James Arnold having been condemned thereby, as *détenteur* of the lot of land, as liable and bound for the payment of the sum of money in the judgment mentioned, it was competent to Archibald Campbell to seize and take in execution in satisfaction of the judgment, the lot of land and premises so declared liable and bound, having duly served the judgment upon James Arnold, and the delay of fifteen days from the service of the judgment, within which he could exercise the option thereby granted to him, having expired. 3° Because the judgment was served upon James Arnold, and because the delay of fifteen days having elapsed from the service thereof upon him, without that Arnold had exercised the option of making the *délaissement* therein mentioned, Campbell by law could legally take in execution, and sell the lot of land and premises, in satisfaction of the sum of money for which the said lot and premises were declared liable, without discussing in the first instance the personal estate of Arnold. 4° Because

Campbell could not legally seize and take in execution the goods and chattels of Arnold in satisfaction of the judgment." A mes yeux, les allégués de l'opposition ne sont pas suffisants, dans l'état de la cause, pour qu'elle puisse être admise. En présence du rapport formel de l'huissier saisissant, que le Défendeur lui avait déclaré qu'il n'avait pas de meubles, il était nécessaire que ce rapport fût attaqué *in limine* par l'opposition même; le Défendeur devait y affirmer qu'il n'avait fait aucune telle déclaration, et que, par conséquent, le rapport de l'huissier était faux, et déclarer en même temps qu'il entendait s'inscrire en faux contre ce rapport. Eût-il eu des meubles à l'époque de la saisie immobilière, sa déclaration qu'il n'en avait pas doit l'exclure aujourd'hui du droit d'attaquer cette saisie sur le seul fondement que ces meubles n'ont pas été discutés. Puisqu'il n'impugne pas, ni par les énoncés de son opposition, ni par le serment qui l'accompagne, la vérité du rapport de l'huissier, il est censé reconnaître l'exactitude de ce rapport, et, au dossier, le rapport subsiste dans toute sa force. S'il avait réellement des meubles, la déclaration qu'il a faite est un acte de mauvaise foi dont il doit subir les conséquences. Comme il ne nie pas avoir fait cette déclaration, si son opposition telle que formulée était admise, il s'ensuivrait que sa mauvaise foi triompherait sur la bonne foi de son créancier et sur celle de l'officier saisissant. Le moyen invoqué dans la *défense en droit* suffit pour faire renvoyer l'opposition. (9 *D. T. B. C.*, p. 33.)

TASCHEREAU, DUVAL and TASCHEREAU, for Appellant.

STUART, G. OKILL, Q. C., for Respondent.

MANDAMUS.

SUPERIOR COURT, Québec, 18 décembre 1858.

Before MEREDITH, Justice.

YOUNG *vs.* LEMIEUX et al., Commissioners of public works.

Jugé: 1° Qu'un marchand qui, en conformité des instructions des commissaires des travaux publics, achète des terres pour ce département, en vertu des dispositions de l'acte 13e et 14e Vic., cap. 13, n'est pas un simple mandataire, mais a le droit d'être payé pour tels services. (1)

2° Qu'il a droit de demander que sa réclamation pour tels services soit référée à des arbitres, en vertu de la 8e section du dit acte.

3° Qu'il a droit à un *mandamus* pour contraindre les commissaires à référer telle réclamation à des arbitres, et ce en vertu de la règle de droit qu'un *mandamus* émanera contre tout officier public chargé par un statut de l'exécution d'un devoir. (2)

(1) V. art. 1702 C. C.

(2) V. art. 1022 C. P. C.

MEREDITH, Justice: In this case, a writ of mandamus issued against the commissioners of public works.

The Petitioner alleges, by his *requête libellée*, that he has a claim against the commissioner of public works, for services rendered by him at the instance of the commissioners from the month of January, 1853, until the month of October in the same year, in and about the purchasing of divers extensive and valuable tracts of land, in the neighbourhood of the city of Montreal; that the commissioners have refused to admit his claim, or to submit it to arbitration; and he, therefore, prays that the commissioners be required and directed to refer his claim to arbitration as mentioned in the conclusion of his *requête libellée*. The commissioners, by their counsel, have declared that they do not wish to urge any objection, of a merely technical nature, against the claim of petitioner, but, upon the merits, they contend: 1stly. That Petitioner has not shewn that he has any legal claim against them; 2° That if Petitioner has any legal claim, it is not one in relation to which an arbitration, under the statute, can take place; 3° That the referring of claims to arbitration is a matter in the discretion of the commissioners, and one in relation to which they cannot be controlled by Her Majestys' Courts of Justice. As to the first point, the Petitioner's claim, it may be observed that the lands purchased were of great value, as is evident from the fact that the price, which is proved not to have been excessive, exceeded £40,000. Comte, the agent for the Seminary, who were sellers to the extent of £19,760, says that "the Petitioner caused the property purchased from the Semi-"nary to be surveyed; and that he was the only person with "whom the negotiations were carried on", and Comte also says "that Petitioner had a good deal of trouble in these "negotiations;" which extended over a period of several months, as already mentioned. As to the sales from the Ladies of the Hôtel-Dieu, Comte says: "It is to my personal know-"ledge that he also negotiated the sales in the same way that "he did with the Seminary; I, myself, was consulted by the "Ladies, and also by Young who acted as a kind of interme-"diary between the parties." The evidence of Glackmeyer exactly agrees with that of Comte; and George Weekes, who acted as the agent of the Ladies of the Hôtel-Dieu, upon the occasion of the sale made by them, says: "The negotiations for "the sale were carried on solely by Young; and it was bet-"ween him and myself that the negotiations were carried on, "and the term and conditions agreed upon... and it is to my "knowledge that Plaintiff took considerable trouble and pains "in effecting the sale." Ostell, surveyor, says that the lands in question were surveyed by him, under the direction of Petitio-

ner for Defendants. In addition to this parol evidence, Petitioner has filed 14 communications, in writing, from the public authorities, to him, in relation to those lands; and 11 letters from him to the officers of the government, on the same subject. All the witnesses who have been examined on this point say that services such as those rendered by Plaintiff, with respect to the sales in question, are usually paid for by a commission varying from 1 per cent. to 2½ per cent., according to the amount of the price; Weekes, who acted as agent of the Ladies of the Hôtel-Dieu, says: " he, himself, received a commission of one per cent. on the amount of the sales negotiated between Petitioner and him; and it is proved that Petitioner received 2½ per cent, on purchases amounting to £38,000, made by him for the Grand Trunk Railroad Company. The court is not called upon to pronounce any opinion upon the reasonableness of the charge made by Plaintiff, the question to be considered, with reference to this branch of the case, is simply this: Has Petitioner shewn that he has any legal claim against the commissioners? And, according to the evidence, to which I have already alluded, in my opinion, that question must be answered in the affirmative. The learned counsel for Defendants contended that in this matter Plaintiff was the mere mandatory, *mandataire*, of Defendants; that, therefore, he is to be presumed to have acted from friendly motives, or, as the French authors say, to have performed *un office d'ami;* and that his services are to be deemed gratuitous. In support of this position, Pothier, *Mandat*, n° 3, and Duranton, 18 vol., n° 195, were cited. I do not, however, see anything either in the nature of the services rendered, or in the position of the parties to justify this view of the case; and the passages cited from Pothier and Duranton do not seem to me to be applicable in the present instance. The contract between the parties, as I regard it, was not a mandate without hire, but an agency for hire; and the following passage from *Bell's Principles of the law of Scotland*, is probably as true, with respect to the course of business in Canada, as in Scotland. That author, at 217, says: " Mandate was in the roman law, and " still is, a binding contract, by which one empowers another " to manage any business for him without hire. But it has, " with us, been almost superseded, by agency or factory, which " is the employment of another for hire, to do the business as " factor for the employer." The number of Duranton next but one to that cited by the learned caunsel for Defendants, makes strongly in favor of petitioner. The passage is as follows: " N° 197. Au surplus, quoique le mandat soit gratuit de " sa nature, cela n'est vrai, néanmoins, que dans le cas où on " peut le considérer comme un office d'ami, et non lorsqu'il est

" l'exercice d'une profession. Dans ce dernier cas, le salaire est " dû suivant la nature de l'affaire et aux taux réglés par la loi " ou l'usage ; il est censé stipulé et promis. Tel est le cas où je " charge un avoué d'occuper pour moi dans telle affaire, un " agent de change de me vendre ou de m'acheter des rentes sur " l'état, un commissionnaire de vendre mes vins, etc. Dans " tous ces cas et autres analogues, je dois le salaire d'usage ; il " est tacitement convenu." As to the second point urged by Defendants, namely, that this is not a cause in which an arbitration can take place under the statute. Without going over the different statutory enactments on this subject, it is sufficient to observe that they, in effect, provide that all disputed claims against the commissioners, " unless the same be made " for salary, wages, or allowances, by any subordinate officer " or person in the employ of the said commissioners," shall and may be referred to arbitrators. (1) It could not, I think, be contended that Ostell, who surveyed the lands in question, or Doucet, who prepared the deeds, or Sir Louis Hippolyte LaFontaine, who acted as legal counsel on the same occasion, should be regarded as subordinate officers, or persons in the employ of Defendants ; and, yet, it appears to me that, in principle, Petitioner is in the same position as the persons just mentioned. A commission merchant who may act for a great number of persons in that capacity, in the course of the same day or hour, cannot, I think, be said to be in the employ of each and all of the persons for whom he acts. The object of the law seems to have been to give all claimants against the commissioners a right to go before arbitrators, excepting where this cannot be done without producing or encouraging insubordination in the department under their control ; and the case of the Petitioner clearly does not come within the reason of the exception. It may be added that it is only reasonable that persons having disputed claims against the commissioners of public works should be afforded a mode of having their claims adjudicated upon by persons not only desinterested but unbiased ; and as the law under consideration has that object in view it ought to receive a liberal construction. For these reasons, I think that the claim of Petitioner cannot be regarded as that "of a subordinate officer, or person in the employ of the com-"missioners," and, therefore, that it is a claim that may be referred to arbitrators, under the statute. As to the discretionary power contended for by the learned counsel for Defendants, I do not think it exists. The statute alleges, in effect, that all disputed claims against the commissioners, with certain exceptions, shall and may be submitted to arbitration. If,

(1) 13 and 14 Vict., cap. 13, sec. 9.

as I have endeavored to shew, this is not one of the excepted claims, then there can be no difficulty as to the words " shall and may," as above used, being deemed imperative. It was, however, I believe, contended that a *mandamus* ought not to be granted against Defendant as they are officers of the Crown ; but the authorities cited by the learned counsel for Petitioner show that pretension cannot be maintained. And, as a general rule, a *mandamus* will be granted against any public officer *charged by statute* with the performance of a duty. In the *King* vs. *The Lords Commissioners of the Treasury*, Hav. and Man., 600, Lord Denman observed : " I cannot assent to the " argument that the court cannot issue a *mandamus* to the " lords of the Treasury, *because they are officers of the Crown.* " The Crown has nothing more to do with them than with any " other public officer," and that opinion was concurred in by the other judges. And in the *Queen* vs. *The Lords of the Treasury*, Perry and Davidson's Rep., vol. 2, p. 502, Sir J. Campbell, now chief justice of the Queen's Bench, Sir F. Pollock, now chief baron of the exchequer, and Sir W. W. Follett, expressly admitted that " if the Lords had refused to hear the appeal the court might have issued a *mandamus*." Upon the whole the court is of opinion that the Petitioner is entitled to a peremptory writ of *mandamus* as prayed for. (9 *D. T. B. C.*, p. 43.)

STUART and VANNOVOUS, for Petitioner.

ANDERSON and PARKIN, for Defendants.

CAPIAS.—CAUTIONNEMENT.

SUPERIOR COURT, Montréal, 30 décembre 1858.

Before BADGLEY, Justice.

LEFEBVRE, Plaintiff, *vs.* VALLÉE, Defendant, *and* VALLÉE et al., Petitioners.

Jugé : Sous la 12e Vict., chap. 42, sec. 12 : Que deux ans après jugement obtenu contre un Défendeur arrêté en vertu d'un *capias*, et nonobstant l'institution d'une action par le Demandeur contre des cautions, sur transport du cautionnement par le shérif, il sera permis, pour cause suffisante, de donner caution pour la comparution du Défendeur tel que pourvu par la 8e section du dit acte. (1)

BADGLEY, Justice : In this case a writ of *capias* was issued on the 10th December, 1855, against Defendant, returnable on the 1st January following. Before the return of the writ, Defendant gave bail to the sheriff, and an appearance for De-

(1) V. art. 825 et 828 C. P. C.

fendant seems to have been entered on the return day, as if on an ordinary writ of summons, and a motion made to quash the writ, which motion was dismissed. Proceedings were had in the cause, and judgment rendered against Defendant on the 25th February, 1856. On the 30th October, 1857, the sheriff made a return to a writ of execution that Defendant had no domicil in the Province, but had been long absent therefrom, and, in June, 1858, Plaintiff instituted an action against the bail, on an assignment of the bail bond made by the sheriff. A petition is now presented by Defendant and the two bail to the sheriff, sued in the other cause, to be allowed, under the 12th section of the 12th Vict., ch. 42, to put in bail for Defendant that he will surrender himself as required by the third section of the act. The court has power to grant this application on cause shewn. The case shewn here, it must be admitted, is not very full or strong ; it is shewn that the bail were ignorant of the law regulating the giving of bail, the bond being in the english language, of which they were ignorant ; that they never had notice of any proceedings in the matter until the institution of the action ; that Defendant was not called upon to surrender himself, but was always willing to do so, and that they will suffer, if the petition be not granted. Although, as above stated, the cause shewn is not altogether conclusive, there is sufficient, coupled with the fact of the debtor's presence, to justify the granting of the petition. By this means, Plaintiff will have his security as provided by law.

JUGEMENT : " La cour, après avoir entendu les Requérants et le Demandeur sur la requête des Requérants, pour acte de leur déclaration que le Défendeur est prêt à se remettre et livrer entre les mains du shérif, quand il en sera requis, et conformément à la loi, et qu'ils soient déchargés du cautionnement du 15 décembre 1855, accorde la requête, en par eux les Requérants fournissant sous 15 jours, à compter de ce jour, bonnes et suffisantes cautions, à la satisfaction d'un juge de cette cour, que le Défendeur se remettra et livrera entre les mains du shérif de ce district quand il en sera requis, et conformément à la loi, et, à défaut par lui de ce faire, que les Requérants soient tenus de payer la dette pour laquelle le Défendeur a été poursuivi en cette cause." (9 *D. T. B. C.*, p. 49, et 3 *J.*, p. 117.)

LEBLANC and CASSIDY, for Plaintiff.

CHERRIER, DORION and DORION, for Defendant.

INFORMATION CRIMINELLE.

QUEEN'S BENCH, CROWN Side, Québec, 24 janvier 1859.

Before Caron, Justice.

Ex parte GUGY, Applicant.

Jugé : 1° Que le recours, par information criminelle, a lieu dans le Bas-Canada, et que les devoirs et pouvoirs du greffier de la Couronne, dans tels cas, sont analogues à ceux du *master of the crown office* en Angleterre.

2° Qu'une motion pour obtenir une information criminelle, une fois déboutée pour cause d'irrégularité ou d'insuffisance de preuve, ne peut pas être renouvelée, soit en corrigeant les irrégularités ou en suppléant au défaut de preuve.

3° Que la personne pour laquelle telle application est faite, ne peut pas faire cette demande en personne.

4° Que la partie qui fait cette demande doit déclarer qu'elle renonce à tout autre recours civil ou autrement.

5° Que la cour, dans les procédures de cette sorte, est dans la position d'un grand jury, et exigera une preuve satisfaisante de la culpabilité de l'accusé, tel qu'on l'exigerait devant un grand jury, à défaut de quoi, elle doit rejeter la demande.

6° Que, dans l'instance, l'on n'avait point offert à la cour une preuve suffisante pour autoriser l'octroi de la règle demandée.

At the last term of the court, Applicant, in person, moved for a rule for a criminal information, for an alleged, libel against J. H. Willan, and his application was rejected, in consequence of his having omitted to file the libel complained of, with his motion and affidavits in support thereof. (1) The application was a renewal of the former one, and precisely the same in every particular, with the exception, that, in the present instance, Applicant file the libel complained of with his motion and affidavits, which were also the same as in the former application ; and he alleged the same grounds in support of the present application which he urged on the first occasion.

CARON, Justice : The present application is one perfectly novel in this country, and, so far as I have been able to ascertain, or to extend my researches, I have not been able to find any similar case in the practice of our courts. This being the case, I abstained from pronouncing any judgment upon it, until I should have the benefit of consultation with my brother judges ; and I am happy to say, that, with the exception of some minor points of slight importance, we are all agreed upon the judgment I am now about to render. Several questions of importance relating to form as well as to the merits arise in this case, and, although, on the merits, the judgment must be

(1) 6 R. J. R. Q., p. 267.

unfavorable to Applicant, yet, inasmuch as it is the first occasion on which these other questions have arisen, I am desirous of availing myself of the opportunity to pronounce an opinion upon them. With respect to the libel itself, the court can have no hesitation in pronouncing it one of the most scurrilous and execrable libels that could, by the most malignant ingenuity, be composed or written; and the unenviable being who wrote and published it, if he could be discovered, would be deserving of most severe punishment, and of being held up to public execration; but the difficulty is the identification of the guilty individual or parties. The first question which presents itself is, as to whether, by the judicial organization of this country, there is any officer qualified to exhibit the information, in case it should be granted. Upon this question, one of my brother judges differs from the others and myself; he is of opinion that we have no officer qualified in this respect in this country; that the officer who discharges this duty in England is, both with respect to his office and its duties, perfectly distinct from the clerk of the crown, and is publicly known and recognized as the "Master of the crown office," and that, consequently, even if the present application were granted, there would be no officer with power to exhibit the information, such as the master of the crown office in England. I cannot concur in this view. The remedy by criminal information, as well as the duty and power of the clerk of the crown, are recognized by a number of our provincial statutes. (1) Even in England it will be found that the distinction between the two offices of "master of the crown office," and clerk of the crown, was not so great as would at first sight be supposed, on the contrary, they appear to be frequently confounded as conferring the same powers and requiring the performance of the same duties; and the clerk of the crown could and did exhibit criminal informations equally with the master of the crown office. (2) The remedy then having been recognized by our provincial statutes, the proper officer to exhibit them is the clerk of the crown, the immediate officer of the court, whose duty it is to attend to the process, writs and orders of the court, and through whom they are executed; and I am of opinion that he has all the powers necessary to exhibit informations, and that his power, in this respect, are analogous to those of the officer, whether master of the crown office, or clerk of the crown, who exhibits them in England. The second

(1) 4 and 5 Vic., cap. 24, sections 15, 26, 27, 42, 43, 44, 45, 46, 47; 12 Vic., cap. 37, sections 28, 29; Judicature Act of 1855, cap. 92, sections 23, 46.

(2) Imperial statute, 4 and 5 Will. and Mary, cap. 18, sec. 2; Tomlin's Law Dictionary, vbo *Clerk of the crown*, and vbo *Information*; 4 Comyn's Digest, 558.

question is, as to whether an application of this kind, once rejected for irregularity or want of sufficient evidence, can be renewed by remedying the irregularities and supplying the deficiency of the evidence. The present application is precisely similar in every respect to the former one presented last term, and the affidavits in support of it are also exactly similar; the only difference between the two being the filing of the libel in this case, which Applicant omitted to file in the former application. Upon this question, I am of opinion that the application cannot be renewed; and, upon reference to the authorities upon the subject, it will be found that the rule is clearly laid down thus, " when the motion (for a rule) has been once discharged, the court will not listen to a second application or amended or additional affidavits." (1) The third point is as to whether the prosecutor, or person in whose name the application is made, can move for the rule himself in person without being represented by counsel. I am of opinion he cannot; the rule on this point is also clearly laid down by all the writers on the subject; (2) and Chitty says (3): " The prosecutor *cannot do it in person.*" The fourth point is that the party applying for the rule is bound to declare that he waives and renounces all other remedy by action of damages, or otherwise; (4) and no such declaration was made in the present instance. All these reasons, therefore, as to the form, and indeed any one of them, the court considers sufficient to cause the present application to be rejected. But, even upon the merits, I find myself unable to entertain the present application; the proof in my estimation not being sufficient. Applications of this nature are made to avoid an investigation by a grand jury, and the court is, consequently, placed in the position of a grand jury, (5) and will, therefore, require the same amount of proof as would be required by a grand jury to justify them in returning a true bill. (6) The old belief that prevailed that grand juries had merely to investigate cursorily, so as to send the matter before a petty jury, has happily exploded, and the modern and just principle which now

(1) *Rex* vs. *Smithson*, 4 B. and Ald., 861; 1 Harrison's Digest, 2254; Archibald's Practice, p. 30; Grady and Scott, 24.

(2) 1 Chitty's Rep., 602; Grady and Scotland, p. 21; Archibald's Prac., 29.

(3) Chitty's Crim. L., 858.

(4) 2 Term Reports, p. 198; 1 Chitty C. L., pp. 6 and 856; 2 Burn's Justice, pp. 7, 9 and 816; Grad. and Scot. p. 16.

(5) Comyn's Digest, 858; 6 T. Rep., 285.

(6) 4 Comyn's Digest, 848; Grad. and Scot, pp. 4 to 7; Archibald's Prac., p. 30.

obtains is that the grand jury must be satisfied of the guilt of the accused by the evidence before them ; and the court, in applications of this kind, must, therefore, have the same amount of evidence ; (1) and I have no hesitation in saying that, in this case, there is no sufficient evidence to justify a grand jury in returning a true bill, and, consequently, no sufficient proof to induce the court to grant the present application. There are only two affidavits, one from an individual by the name of Kirk, who is at enmity with the accused, and this circumstance, although no proof against the contents of his affidavit, yet ought to be taken into the consideration of the court under the circumstances ; and the other is the affidavit of the prosecutor himself, in which he states, that, if his application be granted by the court, he will be able to prove, in due time and place, who is the author of the libel ; now this is the strongest reason why the application ought to be rejected. for it shews that the prosecutor had additional, or better evidence than he had presented to the court, thus implying that he himself felt that he had not afforded the court sufficient evidence ; whereas the court, as well as the grand jury, require the best evidence of which the case is susceptible ; besides, there is nothing whatever in his affidavit to shew that the accused is the author of the libel, and, by Kirk's affidavit, it appears that the accused was not alone in publishing the libel, that he had an assistant or assistants, and, therefore, it would be right that the whole matter should be fully investigated, which the court cannot do by the affidavits before it. Besides, this extraordinary and exceptional remedy, by way of criminal information, ought to be as rarely as possible resorted to, so as to avoid the scandal, in many instances, of public investigations into matters which should properly be conducted more privately by a grand jury ; and there is nothing shewn to the court, in this case, to justify the belief that Applicant would not get justice, if he profferred his claim through the ordinary channel, by a bill submitted to a grand jury. For these reasons, I am of opinion that the proof offered is not sufficient, and, in this, the court is unanimous. The application must therefore be rejected. (9 *D. T. B. C.*, p. 51.)

(1) Roscoe, 224 ; Blackst C., 303 ; 1 Archibald, 98 ; Dickenson's Guide, 144 ; 1 Chitty, 318 ; Archibald's Prac., 30.

NATIONAL LIBRARY

DONATION.—RENTE VIAGERE.—EVOCATION.

SUPERIOR COURT, Montreal, 27 septembre 1858.

Before MONDELET, Justice.

DALPÉ dit PARIZEAU *vs.* BRODEUR et ux.

Le Demandeur fit donation à son fils de certains meubles et immeubles sujette à une rente viagère, et, subséquemment, fit une autre donation de certains immeubles, sujette aussi à une rente viagère, avec clause que cette dernière donation profiterait à l'épouse du donataire, tant qu'elle resterait veuve seulement, et, par la dernière donation, le donateur donna quittance, tant pour la rente due que pour la rente à écheoir en vertu de la première donation ; le donataire étant mort et sa veuve s'étant mariée.

Jugé: 1° Que les deux donations devaient être interprétées l'une par l'autre, et que la seconde étant devenue nulle, la quittance qu'elle contenait n'empêchait point que le Demandeur pût réclamer la rente stipulée par la première. (1)

2° Qu'une action de rente viagère portée devant une cour de commissaires peut être évoquée. (2)

MONDELET, Justice : This action was commenced in the Commissioners' Court, at Varennes, against Defendants, as joint tutors to the minor children issue of the first mariage of one of the Defendants, Justine Christin dit St. Amour, with Auguste Dalpé dit Parizeau, her first husband, to recover the sum of £4. 5., a *rente viagère* due on the 29th September, 1857, under a deed of donation from Plaintiff to his son, Auguste Dalpé, dated the 1st April, 1846. A motion in evocation was made and allowed. On the 4th July, 1853, the father makes a similar donation of another farm to his son, with a stipulation that it should have effect in favor of Justine Christin, then wife of the donee, now one of Defendants, so long as she should remain a widow and that in case of the death of his son, and his widow marrying again, this latter donation should become null and of no effect. There is also a discharge given, in the latter donation, for all the rent due or to become due under the first, and the action is brought after the second marriage which took place in February, 1857. The Defendants contend that they are not liable, inasmuch as the second donation gives a discharge for all rent accrued and to accrue, and that, notwithstanding the second donation may have become null, by the second marriage, yet that the discharge is still operative. This I am not prepared to adopt. Both the donations must be read together; and the intention of both is against the pretensions of the Defendant. Had the second donation contained a receipt for a specific sum of money

(1) V. art. 1013 et suivants, C. C.

(2) V. art. 1058 C. P. C.

it might have been sufficient evidence as to payment of that sum, but it must now be considered as if it had never been made, and the first donation, therefore, subsists in its full force, and judgment will go for Plaintiff.

JUGEMENT: " Considérant que les Défendeurs sont mal " fondés en leur exception, et que, par l'acte du 4 juillet 1853, " il n'a pas été opéré une décharge des obligations contractées " par Auguste Dalpé dit Parizeau, donataire, envers le De- " mandeur, son père, donateur, de manière, qu'arrivant l'annu- " lation du dit acte du 4 juillet 1853, à empêcher de revivre " l'obligation stipulée en l'acte de donation du 1er avril 1846, " par Auguste Parizeau, de payer à son père la rente et pen- " sion viagère y détaillée ; et, attendu que, par le décès du dit " Auguste Parizeau, et le convol en secondes noces de sa veuve, " la Défenderesse, avec le Défendeur, l'acte du 4 juillet 1853, " se trouve annulé, et comme s'il n'avait jamais été consenti, " la rente et pension viagère stipulée envers le Demandeur au " dit acte du 1er avril 1846, se trouve revivre, et être exigible " par le Demandeur, et, nommément, ce qu'il en réclame par " son action, déboute la dite exception des Défendeurs." (1) (9 *D. T. B. C.*, p. 56.)

CHERRIER, DORION and DORION, for Plaintiff.

OUIMET, MORIN and MARCHAND, for Defendants.

OPPOSITION.—USUFRUIT.

SUPERIOR COURT, Montreal, 30 décembre 1858.

Before BADGLEY, Justice.

SIMPSON et al., Plaintiffs, *vs.* DELISLE, Defendant, and DORION, Opposant.

Jugé : Que le transport d'un droit d'usufruit d'un immeuble pour sept ans, ne donne au cessionnaire que le droit d'exercer l'usufruit, mais ne le met pas en droit de former opposition à la vente de tel usufruit sur exécution contre les biens du cédant (2).

(1) The following are the clauses of the second donation. " Et il est entendu, " entre les dites parties, que les présentes auront leur effet en faveur de " Justine Christin dit Saint-Amour, épouse du donataire, tant qu'elle gardera " viduité, mais pas plus longtemps. Et, dans le cas où le donataire décéderait " avant son père, et dans le cas encore où la dame du donataire convolerait " en secondes noces, ou si la dite dame devenant veuve, voulait faire occuper " la dite terre par un fermier, et quitterait la dite terre, alors, les présentes " deviendront nulles, et le donateur rentrera dans la propriété des dits " immeubles, comme si les présentes n'eussent jamais été consenties. Et, par " ces mêmes présentes, le donateur donne quittance et décharge bonne et " valable pour toute la rente, tant échue qu'à écheoir, mentionnée dans un " certain acte reçu devant les notaires soussignés, en date du premier avril " mil huit cent quarante-six."

(2) V. art. 659 C. P. C. et 479 C. C.

BADGLEY, Justice: In this case, an execution issued against Defendant under which his right of usufruct in one half of certain real estate was seized. The Opposant, Dorion, filed an opposition *à fin d'annuler*, founded upon a transfer from Defendant, and his wife, of their right of the usufruct of the lot of land and store thereon for seven years, from the 1st of May, 1855, and prayed that Opposant might be declared proprietor of the usufruct, during the period mentioned, and the seizure declared null and void, and also that, in the event of the court ordering the sheriff to proceed to the sale of Defendant's usufruct, such sale should be made subject to his rights under the transfer, until the 1st May, 1862. The opposition treats the usufruct as realty, and it undoubtedly is a property, *un droit immobilier*, which if it can be passed to another must be passed in its entirety, a temporary transfer cannot properly assign it. In this case, the assignment relied on does not convey the right of usufruct itself. It conveys only the right of exercising or using the usufruct for a limited period, in the nature of leasehold, the property or title to the usufruct being still vested in Defendant "qui est toujours l'usufruitier en titre," the assignment has only transferred for the time "ce que cette jouissance peut avoir d'utile, mais elle "n'opère pas un transport parfait dans le droit lui-même. (1)" The distinction is very clearly shewn in the author cited. The opposition must therefore be dismissed.

JUDGMENT: "Considering that the assignment to Opposant, for a limited period of years, of the usufruct mentioned in the deed of transfer, qualified deed of sale, made to Opposant by Defendant and Julia Maria Arnoldi, his wife, was a transfer of the mere *jouissance*, during that period, of the said usufruct, and, considering that Opposant hath no title of property, nor any possession of, in or over the real estate seized, to prevent the seizure and sale thereof, doth reject the opposition." (9 *D. T. B. C.*, p. 59.)

LAFLAMME, R. and G., for Plaintiff.

DAY and DAY, for Defendant.

ASSURANCE.—GARANTIE.

SUPERIOR COURT, Montréal, 28 septembre 1858.

Before SMITH, Justice.

SOMERS *vs.* THE ATHENÆUM FIRE ASSURANCE COMPANY.

Jugé: 1° Que l'erreur de l'agent d'une compagnie d'assurance, en préparant et transmettant au bureau principal un plan des biens assurés,

(1) Proudhon, *Usufruit*, Nos 15, 16, 17, 23, 888, 889, 890 et 894.

sur lequel plan les bâtisses sont désignées dans la police comme "séparées," au lieu d'être désignées comme "attenantes à d'autres bâtisses," ne peut priver l'assuré de son recours en vertu de telle police.

2° Qu'en réponse à une défense alléguant que la police avait été obtenue par de fausses représentations et frauduleusement, quant à la position des bâtisses et quant au nombre de personnes qui en avaient l'occupation, et qu'en conséquence la police était nulle, et le Demandeur privé de tout recours en vertu d'icelle, il est loisible au Demandeur de nier telles fausses représentations, et d'alléguer l'inspection des lieux assurés par l'agent de la compagnie, et ses actes en préparant et transmettant un plan erroné. (1)

The action was brought to recover £300, amount of insurance on buildings belonging to Plaintiff. The insurance was first made on the 7th November, 1855, for a year, and was renewed on the 7th November, 1856, for another year, as appears from a premium receipt of that date. The fire took place on the 21st November, 1856. The Defendants pleaded *first*, the fraudulent misdescription of the premises by the assured, the house being described as *detached*, whereas it was in fact connected with an adjoining wooden building; and, *second*, that the building was represented as being occupied by two tenants, whereas, in fact, there were more than two: the plea sets up that, by the conditions of the policy, applicants for insurance were bound to state correctly the description of the property and the number of occupants, and that, if by such misrepresentations, a policy was obtained, no benefit should result from such policy. It is then alleged that the policy was obtained by such false and fraudulent misrepresentations, and that Plaintiff had thereby lost all benefit resulting from it. The Plaintiff, in answer to the plea, alleged, that he gave no false description, and made no false or fraudulent misrepresentations; that Joseph Whydden, the Company's agent, visited the premises, previous to the execution of the policy, and caused a plan to be made, which had ever since been kept by the Company; that the house was then connected with the adjoining building only by the roof, and further that, on the payment of the premium for the second year, he informed the Company's agent that his building still touched the same house on one side, and that another house had been built on the other side, and that entries were made by the Company's agent to that effect in their books. The following points and authorities were submitted by the counsel for Defendants: 1° The special answer constitutes a departure from the declaration, and the evidence does not support the action as it is set up in the declaration. This is fatal; 2° The description in the policy is a warranty, and every warranty must be literally fulfilled, or

(1) V. art. 2572 C. C.

the policy is void (1); 3° And it is *promissory* as well as affirmative (2); 4° A misrepresentation or misdescription, whether arising from fraud or negligence, avoids the policy (3); 5° Here, there are two breaches of warranty, the house is attached instead of detached, and had four tenants instead of two. One house was attached at the time of the execution of the policy, another was afterwards built, of which a written notice was given in conformity with the conditions of the policy, but the omission of the first was a manifest misdescription and a fatal breach of warranty. It cannot be got over by the incidental mention of it to an under clerk, in a conversation of Plaintiff with him, even if that clerk's evidence were to be believed, and if parol evidence to change the contract were admissible; 6° The conditions of a policy are *de droit étroit* (4); 7° The Plaintiff has infringed the 1st and 2nd conditions of the policy; 8° The Plaintiff cannot offer parol evidence directly to contradict the policy, in respect of the description of the subject assured, and, by that means, escape the consequences of the misdescription, of the breaches of warranty, and of the conditions of the policy (5); 9° Neither in chancery, not at common law, will parol evidence be received tending to prove an agreement different from the one made by the same parties under seal (6); 10° Assuming that a mistake in drawing articles might be proved by parol, yet in an action of convenant, on written articles, Plaintiff cannot prove by parol evidence an agreement different from the one on which he has declared (7); 11° When a mistake was alleged to have been made in a settlement, the court would not allow it to be corrected on the evidence of the attorney who drew it, because there was nothing in the handwriting of the parties to show that a mistake had been committed (8); 12° Hence the court will not receive mere parol

(1) 1 Phillips, *on Ins.*, p. 416, § 760, p. 421, § 762, p. 468, § 866, p. 469, § 869, p. 470, § 871; 1 Arnould, p. 491, § 184, p. 584; 7 Hill, 188; 13 Wendell, 92; 16 Wendell, 481; 6 Cowen, 673; 7 Wendell, 270.

(2) Grun, 476; 1 Arnould, 581; 2 Duer, p. 657; *Ib.*, *note* 6, p. 749.

(3) 1 Arnould, 488, § 181.

(4) Grun, 20; 1 Phillips, p. 468, § 866.

(5) Phillips, *on Ev.*, Ed. 1849, pp. 356, 357 and 358, and cases cited; 2 Saunders' Pleading and Ev., pt. 1, p. 497; 1 Duer, 176, § 27; *Weston* vs. *Emes*, 1 Taunton, 116-117.

(6) *Dwight* vs. *Pomeroy*, 17 Mass, 303.

(7) *Barndoller* vs. *Tate*, 1 Serg and Rawle, 160; *Henkle* vs. *Royal Ins. Co.*, 1 Vesey, 318, which was a bill in chancery to correct a mistake in a policy. The deposition of the agent, being the principal evidence, was not considered proper proof," there being no writing to support it.

(8) *Hardwood* vs. *Wallis*, cited in 2 Vesey, 195.

evidence alone (1); 13° Only in cases where fraud is alleged. (2)

SMITH, Justice : The defence rests chiefly on the allegation of misdescription of the premises, which are described as " detached " in the policy, in which are to be found the words " as per plan and application n° 6308, filed in this office. " This plan or diagram was made by the Company's agent at Montreal, and was transmitted to Kingston, where the head office of the Company was, and where the policies were issued. The diagram shows the situation of the premises in question, the distance of the sheds and of the adjoining houses, and Whydden, then the Montreal agent, admits that Plaintiff stated his premises to be connected on one side with the premises of one Pelletier, and states also that, in the diagram transmitted to Kingston; which is on the back of the printed proposals for insurance, the square space on which is written " Risk, £300 " should be divided by a line so as to indicate the two buildings, that of Plaintiff, and that of Pelletier. The answers to the printed questions in the proposals were written down by one of the clerks, *Homier*, and signed " Thomas Somers, per J. B. Homier," and the diagram was made by him, under instructions given by Whydden, who visited the house. Homier distinctly states that he wrote down the answers and filled up the application from the statement of Whydden, and not from that of Plaintiff, and also says that, on the renewal of the insurance, Plaintiff stated that Pelletier's house touched his, and mentioned that another house had been built near his building on the other side, Plaintiff thus had nothing to do with the making of the diagram, nor had he ever seen it. The error in stating the building to be " detached " is the error of the Company's agent, and cannot be visited upon Plaintiff. Besides, it is in evidence also, that the premium paid was at the rate of thirty shillings *per cent.*, which is the premium for a connected building, instead of twenty-five shillings *per cent.*, the premium for a " detached " building. With respect to the number of tenants, I do not find that there is any evidence to show that, at the date of the policy, there were more than two tenants as mentioned in the proposals for insurance. As to the assignment of new matter in Plaintiff's answer to the plea, it is to be noticed that the plea rests on alleged fraudulent misrepresentations in obtaining the police, and the breach of the specific conditions indorsed and printed on the back of the policy, and on Plaintiff's thereby obtaining insurance at a less rate of premium, and not on a breach of the express warranty in the policy itself,

(1) 1 Dickenson, 295 ; *Sheryold* vs. *Boone*, 13 Vesey, 373-376.

(2) Sounders, pt. 1, Loc. cit ; 2 Phillips *on Ev.*, 357.

in which the description of the building is given. The special answer traverses these allegations of the plea, denies the fraudulent misrepresentations, and sets up the visit of the agent to the premises and his doings in sending up the plan. This is no departure. It arises from and is an answer to the plea, and is such a new assignment or averment as is permissible in pleading. (1) There is no attempt to bring forward a new cause of action. It is similar to the case of an action on a note, where the plea is prescription, and the answer is a subsequent promise. The prescription and promise are not set up in the declaration. In this case, there is no plea of breach of warranty, and such breach cannot be invoked unless pleaded and proved, nor are the pleas made out in evidence, indeed the reverse is proved, so far from false and fraudulent misrepresentations having been the cause of the making of the policy and of the Company's taking a less premium, the misdescription arose from the error of Defendants' own agent. It is said Plaintiff accepted the policy with the error in it. He did so, but he did not perceive the error; if he had he would have rectified it. (2)

JUDGMENT: " Considering that Plaintiff hath established, " by legal evidence, the material allegations of his declaration: " and, further, considering that Defendant hath failed to " to establish, by legal evidence, the allegations of the exceptions pleaded, or that there was any fraudulent misrepresentation or concealment by Plaintiff, in the proposals for " effecting the policy now sued on, either in the description of " the premises insured, or of the number of tenants occupying " the premises at the time of the making of the proposals, or " of making the policy. The court doth dismiss the said " exceptions, and doth condemn Defendant to pay over to " Plaintiff the sum of £300, etc." (9 *D. T. B. C.*, p. 61, et 3 *J.*, p. 67.)

LEBLANC and CASSIDY, for Plaintiff.

ABBOTT and BAKER, for Defendants.

(1) Saunders, pp. 502, 806; Gould's Pleading, 453.

(2) Other autorities referred to by the Judge on rendering judgment: Hammond's Insurance, pp. 82, 83; Ellis on Insurance, pp. 91, 179; Arnould, pp. 51, 52.

CAUTIONNEMENT JUDICIAIRE.

SUPERIOR COURT, Montréal, 30 décembre 1858.

Before BADGLEY, Justice.

REGINA, upon the information of the Attorney General, *vs.* CROTEAU.

Jugé : Dans une action contre la caution, pour la comparution d'une partie devant la Cour du Banc de la Reine, au criminel :

1° Qu'après un plaidoyer de non coupable de la part de l'accusé, il ne peut être enregistré aucun défaut contre lui sans avis préalable, à moins qu'un jour n'ait été fixé pour sa comparution.

2° Que c'est par la Cour du Banc de la Reine qu'une reconnaissance doit être déclarée fortaite, dans des cas analogues à celui soumis, mais seulement après avis donné. (1)

BADGLEY, Justice : This is an information against Defendant as one of the bail, or surety, in the Court of Queen's Bench, for one Pappen, charged with subornation of perjury. The recognizance is dated the 17th May, 1853, and the condition of it is, that " if Pappen do appear in person, at the next " Court of Queen's Bench, holding criminal pleas in and for " said district, to be holden at the court house, in the city of " Montreal, on the 14th day of October next, and shall appear " from day to day, until he be duly discharged, then and " there to answer to said complaint, and shall keep the peace " and be of good behaviour towards all Her Majesty's liege " subjects until that time, then this recognizance shall be null " and void, otherwise to remain in full force and virtue." It is admitted that Pappen appeared before the Court of Queen's Bench, on the 17th October, 1853, and, on being called and arraigned, pleaded not guilty to an indictment for subornation of perjury, and that this was the only charge against him; an admission is also given, that " it does not appear, " from the records of the Court of Queen's Bench that any " day was fixed or appointed for his trial." The only other evidence of record is a certified extract from the registers of the Court of Queen's Bench, to the effect that, on the 3rd November, 1853, and a few days after Pappen's arraignment, he Pappen, " is called on his recognizance entered into before " the Hon. Jean Roch Rolland, one of the justices of this " court, on the 17th day of May last, and makes default" and that his sureties are called on to produce the body, and " fail " to do so." The Defendant has pleaded, *first :* That the offence charged was only a misdemeanor, and might have been tried in the absence of the accused, and that the informa-

(1) V. art. 589 Code criminel.

tion was premature; *secondly*: That notice in writing should have been given to the bail at the time of the entering of the recognizance, of the time and place for the appearance of the accused, which was not done; *thirdly*: That Pappen did appear, and pleaded not guilty, and that the recognizance was thereby complied with, the *fourth* plea adds that no day was ever fixed for the trial, and no application made that he, Pappen, should stand committed for trial. The points relied on at the argument were, *first*: That Pappen, the accused, having pleaded, no default could be entered against him without notice, unless on a day appointed for his appearance, *second*, that the recognizance was never estreated, and that the judges of the Court of Queen's Bench were the proper tribunal to decide whether a recognizance should or should not be forfeited. The authorities cited from Bacon's Abridgment and Petersdorff sustain this view of the case.

JUDGMENT: "Considering that the information has not been "legally established, and that no proof exists of the obser- "vance of the formalities required by law for the estreatment "of the recognizance, upon which the information is founded, "doth dismiss the same." (1) (9 *D. T. B. C.*, p. 67.)

DUNLOP, for Attorney General.

CARTER, ED., for Defendant.

NOTE.—A similar judgment was rendered on the following day, on the same grounds, by Smith, Justice, on an information against Louis Beaulieu, the other bail for Pappen, No 2396, *Attorney General* vs. *Beaulieu*. Judgment: "Considering that the said attorney general, for and on behalf of Her Majesty, hath failed to establish any legal forfeiture of the bond on which the present information in founded, the court doth dismiss the present information.

SAISIE.—IMMEUBLE.

SUPERIOR COURT, Montreal, 31 December, 1858.

Before SMITH, Justice.

ANDERSON et al., Plaintiffs, *vs.* LAPENSÉE, Defendant, *and* PALMER, Plaintiff, *vs.* LAPENSÉE, Defendant.

Jugé: 1° Que lorsqu'un immeuble est saisi en vertu de deux writs d'exécution de même date, il n'est pas suffisant de donner les numéros et les noms des parties dans les deux causes, et de dire dans un seul procès-verbal que la propriété a été saisie en vertu des deux writs.

2° Que lorsque les tenants et aboutissants d'un immeuble sont donnés en détail ainsi que l'étendue de la propriété, de manière à ne laisser aucun doute quant à la propriété saisie, la saisie ne sera pas déclarée

(1) Bacon's Abridgt., vbo *Bail*, letter L, p. 498; Petersdorff, vbo *Bail in crim. cases*, p. 354, note L, also p. 356; Hawkins, P. C., book 2, ch. 15, § 84.

nulle, quoiqu'une bâtisse contenant deux maisons soit indiquée comme une seule maison. (1)

The Plaintiffs in these causes were represented by the same attorney ; two writs of execution were issued bearing the same date, and two warrants placed in the hands of a bailiff, for the seizure of the immoveable property of Defendant, which consisted of one lot of land, or emplacement ; the bailiff made but one *procès-verbal* of seizure, with the heading of the two cases, stating the seizure to have been made under two warrants addressed to him, founded upon the two writs of execution. An opposition was filed by Defendant founded on two grounds: 1st, Because there should have been a separate *procès-verbal* of seizure in each case, and 2nd, Because the description of property given in the *procès-verbal* was not the true description, inasmuch as it only mentioned one house as being on the lot, whereas there were two.

SMITH, Justice : The main question raised by this opposition is whether one *procès-verbal* is sufficient in the case of two Plaintiffs in different causes putting their writs of execution into the sheriff's hands at the same time. I think one *procès-verbal* is not sufficient. The law would seem to hold them as independent seizures, requiring in each the observance of the formalities required by law. The second ground as to the misdescription of the property is unfounded. The seizure is of a lot in the parish of Lachine, the boundaries of that lot are given with minuteness, also the names of the neighbors, and the extent in feet on each line, so that it is impossible to be in doubt as to the property seized, whether the house is to be called, as the Opposant pretends, a double house making two houses, or is to be viewed at a single one.

JUGEMENT : Considérant que quoiqu'il y avait deux saisies-exécutions émanées contre le Défendeur, il n'y avait qu'un seul procès-verbal de saisie, maintient la dite opposition. (9 *D. T. B. C.*, p. 69.)

MORRISON, for Plaintiffs.

LORANGER and LORANGER, for Opposant.

(1) V. art. 638 et 642 C. P. C.

CAUTIONNEMENT POUR FRAIS.

SUPERIOR COURT, Montreal, 30 December, 1858.

Before BADGLEY, Justice.

MAHONEY et al., Plaintiffs, *vs.* TOMKINS, Defendant, *and* GEDDES et al., Opposants.

Jugé: Que des Demandeurs qui se sont absentés de la Province, après jugement rendu, sont tenus de donner caution pour les frais à un Opposant dont ils contestent l'opposition. (1)

BADGLEY, Justice : Opposants move that Plaintiffs, who are judgment creditors, and contest their opposition, do give security for costs, inasmuch as they have left the Province since the rendering of the judgment, and the motion must be granted. The statute, as well as the jurisprudence of this court, are concurrent on the point as appears from the case cited. (2) 9 *D. T. B. C.*, p. 72.)

DAY and DAY, for Plaintiffs.

MONK and MACRAE, for Opposants.

PROCEDURE.—OPPOSITION.

SUPERIOR COURT, Montreal, 30 December, 1858.

Before BADGLEY, Justice.

McDONALD, Plaintiff, *vs.* GRENIER, Defendant, and GRENIER, Opposant.

Jugé: Qu'une opposition à un writ de *venditioni exponas* de meubles sera renvoyée sur motion, l'opposition ne contenant aucun moyen spécial au soutien d'icelle. (3)

(1) V. art. 29 C. C.

(2) N° 2067, *Benning* vs. *Rubber Co.* and *Corning* et al., Opposants, and *Hon. John Young*, Opposant. The monies were awarded by the report or judgment of distribution to the Opposant, Young, for rent, and the Opposants, Corning et al., who contested the collocation were ordered to give security for costs to Young. Judgment at Montreal, 28th October, 1858.—MONDELET, Justice.

N° 298, *Church* vs. *Bostwick and Wheeler*, Tiers-Saisi ; DAY, Justice. In this case the declaration of the T. S. was contested by Plaintiff residing out of Canada, and a motion for security for costs has therefore been put in. The court is of opinion that the motion must be granted. The statute goes much further than the pretensions raised at the argument, and includes not only Defendants but parties interested. Even without positive enactment the motion would be granted on general principles. Judgment at Montreal, 25 May, 1852, Day, Vanfelsen and Mondelet.

(3) V. art. 135 C. P. C.

BADGLEY, Justice: A motion has been made by Plaintiff to dismiss an opposition filed to a writ of *venditioni exponas* issued against moveables. There are three grounds set out in the opposition: 1° that the goods had been already seized, without mentioning when, or in what cause; 2° that the amount demanded by the bailiff was too high; 3° a general ground that the execution is *vexatoire*. There being no particular fact alleged on the face of the opposition to support it, it is too general to be regular, and is dimissed on that ground, on motion; without, however, basing the judgment on the other ground raised, namely, that it was filed without the order of a judge, which is not required by law. (1) (9 *D. T. B. C.*, p. 73, et 3 *J.*, p. 72.)

OUIMET, MORIN and MARCHAND, for Plaintiff.

BONDY and FAUTEUX, for Opposant.

CAPIAS.—CAUTIONNEMENT.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 5 October, 1857.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL and CARON, Justices.

CAMPBELL Appellant, and ATKINS et al., Respondents.

Jugé: Par la Cour Supérieure, qu'un Défendeur, arrêté par *capias*, peut donner un cautionnement spécial, en aucun temps après jugement, lors même que le premier cautionnement a été transporté à un tiers qui en poursuit le recouvrement.

Les juges de la Cour d'Appel étant également divisés, ce jugement est confirmé. (2)

The appeal was from a judgment rendered in the Superior Court, in the district of Quebec, on the 18th day of April, 1857, in an action instituted upon a bail bond to the sheriff, entered into by Respondents, in a cause wherein Andrew W. Hoffman was Plaintiff, and John Atkins, one of the Respondents, was Defendant; the bond to the sheriff having been by him assigned to Hoffman, and by him reassigned to Appellant. The declaration set forth the issuing of the writ of *capias ad respondendum* in the original cause of *Hoffman* vs. *Atkins*, against Atkins, his arrest, the giving of bail for him to the sheriff, by George Hall and Joseph Parke, two of Defendants (and two of Respondents), the forfeiture of the bond, the assignment thereof to Hoffman, the rendering of judgment in the original cause in his favor against Atkins, by the Superior Court, on

(1) V. art. 588*a* et 664 C. P. C.

(2) *Lefèvre* vs. *Vallée*, suprà, p. 96, et art. 824 C. P. C.

the 3rd of February, 1855, for the sum of £275 14s. 4d. with interest and costs, the reassignment, on the 26th of February, 1855, of the bond by Hoffman to Appellant, and the notice of such assignments to Respondent, on the 1st of March, 1855. The declaration then concluded for a condemnation against Respondents for the debt, interest and costs. To this action, a perpetual exception was filed, in which it was alleged that, by the statute 12 Victoria, cap. 42, it was enacted that the court might extend the time for putting in special bail; that, by the 5th George IV, amending the ordinance 25 George III, it was further provided that the condition of such special bail bond should be that the bail should not become liable, unless the Defendant in the cause should leave this province, without having paid the debt, interest and costs, for which the action should have been brought, and that such bail might be put in at any time before or after judgment; that, on the 3rd of September, 1855, in the original cause, n° 1628, wherein Hoffman was Plaintiff and Atkins was Defendant, and in which cause the bond declared upon by Plaintiff had been given, Atkins had made application for leave to put in special bail, which application had been, on the 9th of September, 1855, granted by the court; and the court by its judgment in that cause, n° 1628, had ordered Atkins to pay to Appellant the costs of the action then pleaded to, viz., the cause against Respondents brought upon the bail bond; that the costs had been tendered to, and refused by Appellant, and, on the 29th of September, 1855, Atkins, after due notice given, had put in special bail, by reason whereof Respondents had become freed and discharged from their undertaking entered into by the bond. The exception concluding that Appellant should recover no greater sum than the costs of his action to that time, and, in the event of his persisting in his action, praying that the same might be dismissed, with the costs therein-after to be incurred.

To this plea Appellant demurred, alleging: that Appellant's right of action against Respondents could not be affected by any judgment rendered in a cause wherein he was not a party, nor duly represented. That no court of law in this province could legally make an order in the cause between *Hoffman* and *Atkins*, concerning Appellant's rights in his action against Respondents, and that Appellant could not therefore be bound by any proceedings had in a cause to which he was not a party, nor legally represented. The Appellant also filed a special answer, setting forth that the special bail had been, contrary to law, put in subsequently to eight days after the return of the action, wherein the special bail had been taken, and that the court had not extended, as, by law required, and

could not extend the time for putting in such special bail, inasmuch as the said time for putting in special bail had long previously elapsed ; that the court had no power, by permitting special bail to be given, to annul a contrat existing between the parties to the bond to the sheriff, after its forfeiture and assignment, and during the pendency of an action by Appellant against Respondents on that bond so assigned ; that the condition of the special bail bond so put in was illegal, and the bond consequently a nullity ; that the special bail, as given, could only be received in cases where a capias had issued agreeably to the provisions of the ordinance 25 George III, chap. 2, sec. 4 ; that the Appellant's right of action could not be affected by any judgment rendered in a cause in which he was not a party, and that the proceedings mentioned in the said exception were, as to the Appellant, *res inter alios judicata.*

The court, by its interlocutory of the 31st of December, 1855, pronounced the following judgment : " Considering " the reasons assigned in support of the demurrer insufficient " in law to entitle Plaintiff to the conclusions thereof, doth " overrule the demurrer," and on the merits, the court below, on the 18th of April, 1857, pronounced the judgment appealed from : " Seeing that the present action is founded upon " a bail bond made by Defendants, on the 7th of September, " 1854, in favor of the sheriff of this district, in a certain " cause wherein Hoffman was Plaintiff, and Atkins was De- " fendant, and that, afterwards, to wit, on the 29th of Septem- " ber, 1855, pending the present action, Atkins, in due form " of law, put in special bail in the said cause, whereby the " said bail bond so given to the sheriff, in the said cause, was " discharged, doth, in consequence, dismiss the present action, " with costs in favor of Plaintiff, and against Defendants, up " to the date of the filing of Defendants' peremptory excep- " tion, inclusively ; but with costs in favor of Defendants, " and against Plaintiff, subsequently to that time."

The propositions of law submitted by Appellant were : 1st, that the court below had no power to permit special bail to be put in after judgment, unless in the cause wherein bail to the sheriff was given, before the forfeiture of the bond to the sheriff, the time for putting in special bail had been by the court extended ; 2nd, that, if the court below had the power to permit special bail to be given, yet the condition of the bail bond, as permitted to be put in, was illegal, and the bond so given was therefore a nullity ; 3rd, that the laws in force in Lower Canada do not intend that special bail should be at all permitted to be put in where the cause of arrest of the debtor is the fraudulent secreting by him of his estate,

but that, in such case, the law comtemplated, as the debtor's means to avoid imprisonment, the security bond mentioned in the 12th Victoria, chap. 42, sec. 3 ; 4th, that the ruling of the court permitting the special bail to be put in, in the cause in which the bail bond to the sheriff was given, could not affect Appellant's rights in his action against Respondents, and as to him is not *chose jugée ;* 5th, that the court below had no power to permit the special bail to be put in to act as a defeasance of the bond to the sheriff after a forfeiture of that bond and action brought upon it. (1)

On behalf of Respondents, it was contended that the writ of capias is a remedy given to the creditor in certain cases to secure to him the payment of his debt, and the bail bond consequently is but ancillary to that remedy. It becomes attached to the debt and is not susceptible of a separation from it, and cannot be held by any other then the creditor. The Appellant, it will be observed by reference to the assignment, has been vested with the right, title and interest of Hoffman in and to the bail bond, without having any right to demand or recover from Atkins the debt. Hoffman, therefore, remains the creditor of Atkins, and it is difficult to understand how Appellant can claim to recover a judgment which has not been transferred to him, and which may at any time be enforced by Hoffman against Atkins. Upon this ground Respondents submit that Appellant has failed to show any right or interest in him to recover the debt, and that as the debt and bond must go together, the assignment to him of the bond alone is utterly valueless. Supposing that Appellant had received an assignment of the debt, then, as his title is derivative, and his rights to be determined in the same way as the right of Hoffman would have been, had he made no assignment, Appellant must take the rights of Hoffman, such as they were and subject to any

(1) Authorities cited by the Appellant : Ordinance 25th George III, chap. 2, sec. 4 ; Ordinance 25th George III, chap. 2, sec. 5 ; 5th George IV, chap. 2, sec. 1 ; 12th Vic., chap. 42, sec. 1 ; 8th Vic., chap. 17, sec. 2 ; 6th William IV, chap. 4, sec. 1.

Code de la Veuve, par A. Venant, page 35, note 1.—Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites, elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.

Théorie sur la nullité, par Solon, volume 1, page 207, nº 327.—Le juge, disait l'immortel auteur de *l'Esprit des lois*, n'est que la bouche qui prononce la parole de la loi, un être inanimé qui ne peut en modérer ni la forme ni la rigueur.

Questions de droit, par M. Merlin, volume 2, page 596.—Si les magistrats pouvaient se permettre de juger les lois qu'ils sont chargés d'appliquer, ce serait le cas de discuter les motifs dont le tribunal a coloré son jugement, mais ce n'est point là la mission des tribunaux ; institués pour faire respecter les lois, ils ne le sont point pour décider si elles sont ou ne sont pas conformes aux idées que chacun peut se former du juste ou de l'injuste.

provision of law which might have affected them, had they continued to be Hoffman's. Hence, Respondents treating Appellant as invested with no greater rights than Hoffman, contend that Atkins having been permitted by the judgment of the Superior Court, of the 19th September, 1855, to put in special bail, and having put in that special bail, in conformity thereto, the bail bond sued upon has become discharged. The Appellant, standing in the place of Hoffman, is bound by that judgment, and, if he felt himself aggrieved by it, the only mode by which he could defeat its operation was by appealing therefrom, and causing it to be reversed if found erroneous. This course Appellant has not pursued, but conceives that he may avoid its binding effect upon him by treating it as not having the force of *chose jugée* against him, because he was not nominally a party to it. He was a party through his assignor, and, in fact, resisted the application to put in special bail. So long as the judgment of the 19th of September, 1855, is not vacated, its operation is to defeat and discharge the first bond, and the circumstance of its assignment to Appellant cannot deprive Atkins of the relief pointed out by the 5th George IV, chap. 2, sec. 1. It is pretended by Appellant that special bail could not be given to Hoffman after he had assigned the bond, but, as the special bail is given to secure the principal with interest and costs, which still belong to Hoffman, it is conceived that to Hoffman alone could the special bail be given, and had the debt, interest and costs, been likewise assigned to Appellant, still special bail should have been given to Hoffman, Plaintiff in the cause, and Appellant as his assignee might in that case exercise all his rights in the name of his assignor.

CARON, J. : La défense consiste dans une exception qui peut se résumer à dire, que le cautionnement sur lequel est fondée l'action est, depuis l'institution de cette action, devenu sans effet, par suite de ce que le *cautionnement spécial* a été fourni par Atkins, dans la cause dans laquelle il était poursuivi par Hoffman, suivant qu'il avait droit de le faire, et la permission que lui en avait donnée la cour par son jugement du 19 septembre 1854; que Atkins s'était conformé aux conditions de ce jugement, et avait fourni le cautionnement sous le délai réglé, et dans la forme voulue par la loi; que le cautionnement spécial avait eu l'effet d'annuler et mettre au néant le cautionnement primitif donné par les Intimés et sur lequel est fondée l'action; que la condition sous laquelle le cautionnement spécial avait été permis par le jugement était de payer les frais de l'action, lesquels frais avaient été offerts et étaient déposés en cour avec l'exception. L'Appelant a répondu spécialement à cette exception que le cautionnement spécial invoqué n'avait pas

annulé le cautionnement originaire ; que le cautionnement spécial était nul et de nul effet pour deux raisons : 1° parce qu'il n'avait pas été fourni à temps ; 2° parce que ce n'était pas le cautionnement, que, d'après la loi actuelle, il lui fut permis de fournir. Ainsi toute la question soumise à la cour inférieure s'est réduite à savoir si le cautionnement du 29 septembre 1855, fourni par les Intimés, est valable et légal, et quant à sa forme, et quant au temps où il a été produit. La cour de première instance, par son jugement dont est appel, a décidé que ce cautionnement était valable et légal, ayant déjà décidé, par son interlocutoire du 17 septembre 1855, *rendu dans la cause originaire de Hoffman* vs. *Atkins*, que Atkins était à temps pour le produire, puisqu'elle lui permit de le faire.

La cour inférieure qui, par son jugement rendu dans la cause de *Hoffman* vs. *Atkins*, le 17 septembre 1855, avait décidé que le Défendeur Atkins était à temps pour demander et obtenir la permission de produire *dans cette cause un cautionnement spécial*, a par le jugement dont est appel, décidé que le cautionnement ainsi par lui fourni était légal et valable, et suffisait pour exonérer les Intimés et les décharger du cautionnement originaire. Les Intimés ont prétendu que ce jugement du 17 septembre 1855, constituait chose jugée, même à l'encontre de l'Appelant, quoique rendu dans une cause où l'Appelant n'était pas partie. Cette prétention de leur part est mal fondée. Si ce jugement est nul pour aucune des raisons qu'il allègue, l'Appelant a droit de se prévaloir de cette nullité à la première occasion qu'on lui fournit de l'opposer. Le transport du shérif à Hoffman et celui de Hoffman à l'Appelant ayant été signifiés aux Intimés (1 mars 1855), l'Appelant aurait probablement pu être mis en cause dans l'instance de *Hoffman* vs. *Atkins*, pour avoir occasion de s'opposer à la demande que faisait Atkins qui devait avoir l'effet de mettre fin au cautionnement transporté à l'Appelant, il aurait aussi de lui-même pu intervenir dans cette instance aux mêmes fins, et, dans l'un comme dans l'autre cas, le jugement qui aurait été rendu l'aurait lié, il eût alors eu force de *chose jugée*. Mais, comme il n'en est rien, et qu'il n'a pas été mis en cause, le jugement quant à lui ne constitue pas chose jugée, et il peut en contester la légalité et soutenir à présent la nullité du cautionnement qu'on lui oppose, donné en vertu de ce jugement, de la même manière qu'il aurait pu le faire s'il eût été mis en cause. Ainsi, dans la première instance, il est loisible à l'Appelant de prétendre que ce jugement est illégal et qu'il n'eût pas dû permettre que le cautionnement spécial qu'il a sanctionné fût fourni. C'est ce que l'Appelant fait par son présent appel, dans lequel ses griefs se résument à dire que le cautionnement spécial permis par le jugement du 17 septem-

bre 1855, et fourni le 29 du même mois est illégal et nul pour les deux raisons déjà mentionnées, savoir : qu'il a été demandé et permis après le temps voulu par la loi, et lorsque la cour n'avait plus juridiction pour le permettre, et ensuite parce que le cautionnement fourni n'est pas celui qui aurait dû l'être d'après la loi existant alors ; ainsi toute la question se résume à ces deux propositions : 1° le 17 septembre 1855, Atkins était-il à temps pour demander et obtenir permission de fournir un cautionnement spécial (special bail) ? 2° s'il était à temps, le cautionnement qu'il a fourni est-il valable, et suffisait-il pour mettre fin à celui originairement donné et sur lequel est fondé l'action ? Quant aux faits de la cause, ils ont été exposés plus haut, il suffira de se rappeler ici les circonstances suivantes : que c'est en décembre 1854, que fut arrêté Atkins, et que fut donné le cautionnement au shérif qui fait le sujet de l'action, que c'est le 3 février 1855, que fut rendu le jugement en faveur de Hoffman contre Atkins, que le transport du shérif à Hoffman est du 15 février 1855, et celui de Hoffman à l'Appelant, du 27 du même mois ; que les transports ont été signifiés aux Intimés le 1er mars 1855 ; que c'est le 21 avril 1855, qu'a été portée la présente action ; que c'est le 3 septembre 1855, qu'a été faite la demande pour permission de produire le *special bail ;* et que la permission ainsi demandée lui a été accordée le 17 du même mois, à peu près sept mois après le jugement principal rendu dans la cause de *Hoffman* et *Atkins.* Pour savoir si cette demande était fondée, et si le jugement qui l'accordait était légal, il faut voir quelle était sur ce sujet la loi à l'époque où il fut rendu (septembre 1855).

Notre premier acte provincial sous ce rapport est l'ordonnance de la 25e Geo. III, ch. 2 (1785) laquelle dans sa section 4, permet, sous les circonstances y mentionées, l'émanation d'un *capias* ou mandat d'arrestation contre le corps d'un Défendeur adressé au shérif, " to hold such Defendant to bail for " his appearance at the return of such writ, and in default " thereof, to commit him to prison, there to remain until special " bail may be given by such Defendant ; or until two days " after execution may be obtained by the Plaintiff if judg- " ment be in his favor." C'est en vertu de cette clause que Atkins fut arrêté sur *capias ad respondendum* émané à la poursuite du dit Hoffman, et que Hall et Parke se rendirent cautions en faveur du shérif, par l'acte qui fait le sujet de la présente poursuite, lequel acte de cautionnement devint parfait en faveur du shérif par suite du défaut du dit Atkins de se livrer au jour du retour du writ, ou de donner le *cautionnement spécial.* Cette ordonnance a été suivie de l'acte 5e Geo. IV, ch. 2 (1825), lequel après avoir récité la clause ci-dessus de l'acte de 1785, et énoncé les inconvénients résultant

de cette loi au préjudice des débiteurs, et la nécessité, pour remédier à ces inconvénients, de changer les conditions du *cautionnement spécial* que les débiteurs étaient tenus de donner d'après la dite section 4 de l'acte de 1785, a statué que pour l'avenir, la condition de tel cautionnement, au lieu d'être ce qu'elle avait été jusque-là, dans tous les cas où un débiteur était arrêté en vertu de la dite ordonnance, sur writ de *capias ad respondendum*, serait : " That the cognizors thereof shall not " become liable unless the Defendant shall leave the Province, " without having paid the debt, interest and costs, for which " the action shall have been brought." Par cette partie de la première clause de l'acte de 1825, la forme du *special bond*, et l'étendue de l'obligation des cautions étaient changées, puisque ce n'était qu'au cas seulement que le débiteur laisserait la Province sans payer sa dette que les cautions pourraient être appelées à le faire. Mais cette même clause a introduit à la loi de 1785 un autre changement ; c'est celui qui se trouve énoncé à la fin de la dite clause dans les termes suivants : " And such " special bail may be put in and given at any time after the " arrest of the Defendant in virtue of such *capias* (capias ad " respondendum) either before the court from which the same " shall have issued, or before any judge or justice of such court, " at any time after or before the judgment." C'est sur cette dernière partie de la clause que les Intimés se fondent pour dire que Atkins était à temps pour offrir le cautionnement spécial qu'il a donné, que la cour avait juridiction pour le permettre et le recevoir, et que quoiqu'il y eût sept mois à peu près que le jugement contre lui fut rendu, il n'y avait aucun délai fatal au delà duquel le droit de fournir tel cautionnement lui fût interdit. Les termes du statut sont aussi précis que possible : " At any time after the arrest of the " Defendant, at any time before or after the judgment." D'après cette disposition il est incontestable que Atkins était à temps. Mais la prétention de l'Appelant est que ce n'est plus cette loi qui doit nous guider dans la décision de cette question, qu'elle a été sous ce rapport changée et abolie par l'acte de la 12 Vic., chap. 42. Il nous réfère à la clause 12 comme tranchant la difficulté en sa faveur. Cette clause après avoir déclaré dans les termes les plus formels, " That nothing in this act " contained shall prevent any person arrested under any writ " of *capias ad respondendum* from putting in special bail to " the action as permitted by the law of Lower Canada," ajoute : " Excepting only that such special bail shall not be " received unless put in on the return day, or at any time be- " fore the return day, or within the eight days next after the " return day."

C'est sur cette dernière partie de la clause que se fonde l'Ap-

pelant pour prétendre que Atkins était trop tard pour faire son application, puisqu'il ne l'avait pas fait *le jour du rapport du writ*, ni avant le jour de ce rapport, ni dans les huit jours qui l'ont suivi. Cette prétention paraît fondée, et le serait effectivement, si cette même clause ne contenait un proviso sur lequel les Intimés s'appuient pour répondre à cette objection. Ce proviso est comme suit : " provided always that it shall be in the " power of the court, upon special application and cause shown, " to extend the time for putting in bail." Or, disent les Intimés, nous nous sommes conformés à cette disposition de la loi, nous avons fait application à la cour pour qu'elle fît usage du pouvoir que lui conférait cette loi d'étendre le délai pour donner le *special bail* en question. Elle nous a accordé cette demande, le jugement qu'elle a rendu prolonge ce délai, sur causes montrées qu'elle déclare bonnes, et permet de fournir le cautionnement sous un nouveau délai qu'elle fixe. Sans ce proviso, disent les Intimés à l'Appelant, votre objection serait fondée, mais avec ce proviso elle n'a aucune force. A cela l'Appelant réplique que ce proviso n'est pas applicable à l'espèce, tout en admettant le droit de la cour d'étendre les délais fixés par la loi pour donner le cautionnement spécial. Il prétend que la demande s'en doit faire, que l'application doit être adressée à la cour avant l'expiration du délai légal, qu'une fois ce délai expiré, la cour est sans juridiction, ne pouvant pas, dit l'Appelant, prolonger ou étendre un délai qui n'existe plus, pour le prolonger il faudrait qu'il existât encore. Il y a bien quelque plausibilité dans cette réplique, et les termes de ce proviso peuvent peut-être se prêter à cette interprétation ; mais, lorsque l'on considère l'esprit de la loi qui est toute destinée à favoriser la liberté du sujet et à restreindre autant que possible l'emprisonnement pour dette, l'on doit, je pense, en venir à la conclusion que le pouvoir de la cour d'étendre ce délai n'est pas limité au temps seulement pendant lequel les délais durent encore. Comme cette extension se doit faire par la cour et que ce pouvoir n'est pas accordé aux juges en vacance, ce serait considérablement restreindre l'effet de ce pouvoir et en empêcher l'application à un nombre considérable de cas. Pour ces raisons et plusieurs autres que l'on pourrait y ajouter, je suis d'avis que la cour inférieure avait le pouvoir qu'elle a exercé, qu'elle était à temps pour prolonger le délai, et que la permission qu'elle a accordée à Atkins de donner le cautionnement spécial était valable, et que, partant, l'Appelant est mal fondé à prétendre que le cautionnement est nul, parce qu'il n'a pas été fourni en temps opportun. Reste maintenant à savoir si c'est bien le cautionnement qui devait être fourni. Le cautionnement ainsi donné, est celui prescrit par l'acte 5 Guil. IV, ch. 2, la condition étant que Atkins ne laisserait pas la Province

sans payer sa dette. Ce cautionnement est valable et suffisant sans contredit, à moins que sous ce rapport la loi qui le permettait eût été abrogée. Nul doute que jusqu'à la passation de la 12 Vic., ch. 42, ce cautionnement eût été bon et valable et eût libéré les cautions en faveur du shérif lors de l'arrestation du Défendeur. C'est à l'Appelant à montrer que cette nouvelle loi a sous ce rapport été modifiée. Sans cela il ne peut réussir dans sa prétention ; car c'est à tort que l'Appelant a dit qu'un cautionnement donné dans une cause où il n'était pas partie, ne pouvait le lier, que les droits qui lui étaient acquis par le transport ne pouvaient lui être enlevés par suite de procédés auxquels il était étranger, en un mot que comme cessionnaire, sa position était autre que l'aurait été celle de son cédant, et que la situation et les droits des Intimés pouvaient avoir été altérés et changés par suite et en conséquence du transport que lui aurait fait Hoffman. Toutes ces propositions sont fausses et sont repoussées par la doctrine incontestable que le cessionnaire ne peut avoir plus de droit au moyen du transport que son cédant, et que la condition du débiteur ne peut être rendue pire par un transport qu'il n'a pas accepté. Je n'ai pas de doute que les Intimés dans la présente instance pouvaient opposer au Demandeur, Campbell, toutes les objections et toutes les exceptions qu'ils auraient pu opposer à Hoffman lui-même si l'action eût été portée en son nom. Cela étant, revenons à la question de savoir si le cautionnement qui pouvait être donné avant la 12 Vic., ch. 42, a été supprimé par suite de cette loi. S'il y a eu abrogation de la première loi, il faut que cette abrogation ait été expresse ou tacite. Expresse, elle ne l'est pas, c'est admis, et l'Appelant ne peut montrer une ligne sur laquelle puisse être fondée cette abrogation expresse. Mais il prétend qu'elle résulte tacitement des dispositions de l'acte 12 Vic., ch. 42. Si je l'ai bien compris, son raisonnement est à peu près comme suit : le statut de la 5e Geo. IV, ch. 2, qui permettait à un Défendeur de donner le cautionnement spécial qui ne liait la caution qu'autant que le débiteur quittait la Province sans payer, était pour les cas où tels débiteurs étaient arrêtés sur *capias ad satisfaciendum*, or, dit-il, l'émanation de tels writs ne pouvant plus avoir lieu depuis la passation de la dernière loi, il s'ensuit que le cautionnement est devenu inutile et doit disparaître avec la cause qui y avait donné lieu. *Cessante ratione legis cessat et ipse lex.* Cette prétention est incorrecte en point de fait, il est faux que le statut de la 5e Geo. IV, ch. 2, soit applicable aux writs de *capias ad satisfaciendum* seulement, au contraire il y est expressément dit, dans la première clause, que c'est au Défendeur qui est arrêté sur *capias ad respondendum* que le droit de donner le cautionnement en question est accordé. Les termes de la loi sont positifs, et il ne

s'agit que d'y référer pour se convaincre que l'énoncé de fait sur lequel est fondée la proposition ci-dessus de l'Appelant est contraire au fait. Mais non seulement ce statut n'a pas été abrogé par implication ou pour les raisons alléguées par l'Appelant, mais l'acte de la 12 Vic., ch. 42, sur lequel il se fonde entièrement pour prétendre cette abrogation, en fait une réserve toute spéciale dans plusieurs clauses, mais surtout dans la 12e dans laquelle il est expressément dit que rien dans cet acte (12e Vict., ch. 42), n'empêchera aucune personne arrêtée sur *capias ad respondendum* de fournir à l'action le cautionnement spécial, tel que permis par la loi du Bas-Canada, maintenant en force, or, il est admis qu'à l'époque où cette loi était décrétée l'acte de la 5e Geo. IV, ch. 2, était en force, ou du moins n'avait jamais été abrogé, d'où il faut conclure que, d'après la clause qui vient d'être citée, le cautionnement en question pouvait être donné par tout Défendeur arrêté sur *capias ad respondendum*, comme l'était Atkins dans l'instance dont il s'agit, à moins que l'Appelant n'eût fait voir que le cautionnement répugnait et était incompatible avec les dispositions de ce nouvel acte, ce que l'Appelant n'a pas réussi à faire. De ce qui précède, je conclus que Atkins pouvait, à l'époque où il l'a fait, donner légalement le cautionnement qu'il a donné, et comme je crois avoir fait voir qu'il était à temps pour le faire, la conséquence est que ce cautionnement a eu l'effet de mettre fin au cautionnement originaire fourni par les Intimés lors de l'arrestation d'Atkins, et sur lequel est fondée la présente action ; si tel est le cas la cour inférieure jugeait bien en renvoyant l'action du Demandeur, avec dépens contre le Défendeur jusqu'à l'époque où il avait plaidé ce moyen de défense. Ces raisons me suffisent pour me faire confirmer le jugement, sans qu'il soit nécessaire d'entrer dans l'examen de la question soulevée par les Intimés lors de l'argument, savoir : que le transport fait à l'Appelant, n'était pas suffisant pour lui donner droit d'action, ce transport n'étant que du cautionnement et non du jugement dont il était l'accessoire, sans lequel il ne pouvait valoir ; jugement cependant qui n'est pas transporté et qui paraît être demeuré en la possession du Demandeur Hoffman, qui le peut mettre à exécution contre Atkins, nonobstant la cession qu'il a faite du cautionnement, qui n'était rien autre chose qu'un des moyens dont il pouvait faire usage pour s'en faire payer. Cette objection me paraît bien loin d'être futile et mériterait d'être considérée si les autres raisons n'étaient pas suffisantes pour me faire disposer de la cause. Le jugement doit être confirmé.

Sir L. H. LaFontaine, Bt, Juge-en-Chef : Le 7 décembre 1854, John Atkins, est arrêté par le shérif de Québec, en vertu d'un *capias* émané à la poursuite de Hoffman. Le même jour

il donne cautions au shérif pour assurer sa comparution au jour fixé qui est le 20 du même mois. Les cautions sont les deux autres Intimés. La condition est dans les termes de la formule n° 4, annexée au statut de 1849, ch. 42, c'est-à-dire, que " si Atkins donne le dit jour, 20 décembre, ou en aucun temps auparavant, ou dans les huit jours après, bonne et suffisante caution à la satisfaction de la Cour Supérieure, ou d'aucun des juges de la dite cour, que lui Atkins se livrera sous la garde du dit shérif aussitôt qu'il sera requis de le faire par une sentence de la dite cour, ou d'un juge d'icelle, donnée suivant la loi, ou qu'à défaut de ce faire, il paiera à Hoffman la dette pour laquelle lui Atkins a été arrêté comme susdit, avec les intérêts et les frais ; ou que s'il donne, tel que prescrit par la loi, le dit jour 20 décembre, ou en aucun temps avant cette époque, ou dans les huit jours qui suivront le dit jour du rapport, un cautionnement spécial dans la cause où le dit writ a été émané comme susdit, alors et dans ce cas, la présente obligation sera nulle et de nul effet, mais autrement elle demeurera en pleine force, vigueur et effet." Aucun de ces cautionnements ne fut donné par Atkins, ni avant le 20 décembre, ni ce jour-là, ni dans les huit jours suivants. Le 15 février 1855, l'acte de cautionnement pris par le shérif le 7 décembre précédent, est par lui transporté à Hoffman, qui, le 3 février, avait déjà obtenu jugement contre Atkins pour la somme de £275 14 4, et qui, le 27 du même mois, transporte le même acte de cautionnement au Demandeur actuel, Campbell, dont l'action est portée pour en recouvrer le montant. Cette action a été intentée dans le mois d'avril 1855. Il paraît que, sur motion faite par Atkins, le 3 septembre 1855, dans la cause à la poursuite de Hoffman, il est intervenu un jugement en date du 19 du même mois, qui lui a permis de donner un cautionnement spécial *(special bail)*, dans un délai indiqué, et à la charge de payer certains frais, sous l'autorité du statut provincial de la 5e Geo. IV, ch. 2, sec. 1 ; le jugement déclarant en même temps qu'à défaut par Atkins, soit de payer les frais, ou de donner le cautionnement spécial dans les délais ainsi fixés, il serait absolument déchu du droit de fournir un tel cautionnement, sans qu'il fût besoin d'aucun autre ordre ou jugement à cet égard. Ce cautionnement spécial *(special bail)* fut donné le 29 septembre 1855 ; et il sert de base à l'exception péremptoire des Défendeurs à la présente action, ceux-ci prétendant que ce dernier cautionnement a eu l'effet d'anéantir à toutes fins quelconques celui qui avait été originairement donné au shérif. Depuis la promulgation de l'acte de 1849, ch. 42, un débiteur peut-il être encore admis à offrir un cautionnement de la même teneur et dans la même forme que celui qui avait été autorisé

par la 1e section de la 5e Geo. IV, ch. 2 ? Telle est la question que présente l'exception des Intimés, et sur laquelle ils ont eu gain de cause, puisque l'action de leur adversaire a été déboutée par le jugement dont est appel. (1) L'ancienne ordonnance de judicature (25 Geo. III, ch. 2), permettait à un créancier d'arrêter son débiteur, lorsqu'il était établi sous serment que celui-ci "était sur le point de quitter la Province " et que ce départ aurait pu priver le Demandeur de son " recours contre lui." Le *capias*, ou prise de corps, qui était accordé par le juge, était adressé au shérif," pour prendre tel " Défendeur à cautions pour sa comparution au rapport ds " tel ordre, et au défaut de cautions, de le confiner en prison, " où il sera détenu jusqu'à ce qu'il puisse donner cautions " spéciales *(special bail)* ou jusqu'à deux jours après l'exé- " cution qui pourra être obtenue par le Demandeur, si le juge- " ment est en sa faveur." Dans l'anglais : " or until two days " after execution may be obtained by the Plaintiff, etc." (sec. 4.)

La disposition de l'ordonnance ayant rendu facile l'émanation du *capias ad respondendum*, il en était résulté bien des vexations auxquelles la 5e Geo. IV, chap. 2, a eu pour objet d'apporter quelque remède, en statuant qu'à l'avenir la condition du cautionnement spécial *(special bail*, ou *bail to the action)*, " serait telle, que les cautions ne pourraient devenir " responsables, à moins que le Défendeur ne laissât cette " province (le Bas-Canada) sans avoir acquitté la dette, ainsi " que l'intérêt et les frais de l'action qui aurait été intentée ;" et que " tel cautionnement spécial pourait être fourni et donné " en aucun temps après l'arrestation du Défendeur, en vertu " de tel *capias*, soit devant la cour d'où serait émané le dit " *capias*, ou devant aucun juge de telle cour, *en aucun temps* " *avant ou après le jugement*." Le cautionnement spécial donné par Atkins, le 29 septembre 1855, est donné sous l'autorité de ce statut, c'est-à-dire, que la condition en est qu'il ne laissera pas le Bas-Canada, sans avoir payé à Hoffman la dette, l'intérêt et les frais, etc. L'acte de 1849, ch. 42, a aboli " l'emprisonnement pour dette." C'est la règle générale ; il y a néanmoins quelques exceptions dont il ne s'agit pas ici. L'acte divise les débiteurs en trois classes. (2) Atkins appartient à la troisième classe. Le statut de 1849 porte expressément " qu'aucun *writ* de *capias ad satisfaciendum*, ou autre exé- " cution contre la personne, ne sera décerné ni accordé après " la passation de cet acte." Quant à l'arrestation d'un débiteur en vertu d'un *capias ad respondendum*, elle peut encore avoir lieu. La 2e section prescrit les cas où le créancier peut avoir

(1) 18 avril 1857, présents ; MM. les juges MEREDITH et BADGLEY.

(2) Mercure et Laframboise, 4 *R. J. R. Q.*, p. 322.

recours à cette procédure. Auparavant c'était seulement lorsque le débiteur était sur le point de quitter le Bas-Canada. Aujourd'hui ce n'est plus cela. La voie du *capias ad respondendum* ne peut être employée, *causâ meditationis fugæ*, que dans le cas où " le Défendeur est sur le point de laisser immédiate-" ment *la province du Canada*, avec l'intention de frauder " ses créanciers en général, ou le Demandeur en particulier." Et lorsque " le Défendeur a caché ou est sur le point de cacher " ses biens et effets dans cette intention," le nouveau statut permet encore d'avoir recours à la même procédure ; ce qui n'avait pas lieu auparavant. Une disposition nouvelle en cette matière, c'est que la cour d'où aura émané l'ordre d'arrestation ou tout juge de cette cour, peut, soit en terme ou en vacance, ordonner que le Défendeur soit remis en liberté, s'il lui est démontré, sur requête sommaire," qu'il n'y avait pas de raison " suffisante pour croire que ce Défendeur était immédiatement " sur le point de laisser *la Province* avec l'intention frau-" duleuse, etc., etc." (Sect. 2.) Selon la 3e section, tout Défendeur ainsi arrêté et *détenu en prison*, en vertu d'un *capias ad respondendum* doit être mis en liberté en tout temps avant la *reddition* de l'un ou l'autre des deux jugements indiqués, s'il donne bonne et suffisante caution à la satisfaction de la cour, ou d'un juge d'icelle," qu'il se remettra sous la garde " du shérif, aussitôt qu'il en recevra l'ordre de la dite cour ou " d'aucun juge d'icelle, ou sous un mois après la signification " de tel ordre faite à lui ou à ses cautions en la manière ci-" après prescrite, et qu'à défaut de ce faire, il paiera au De-" mandeur la dette avec les intérêts et les frais." " Pareille-" ment," ajoute la même section," tout Défendeur ainsi arrêté, " *mais qui aura* donné caution au shérif, tel que ci-après " prescrit, aura droit, *le jour du rapport du writ, ou en tout* " *temps auparavant ou dans les huit jours qui suivront* " *celui du rapport*," de donner bonnes et suffisantes cautions devant la cour dans laquelle la procédure en vertu de laquelle il aura été arrêté sera *rapportable*, ou rapportée, ou devant tout juge d'icelle, portant qu'il se remettra sous la garde du shérif aussitôt qu'il en sera requis par un ordre de la dite cour, ou de tout juge d'icelle, donné en la manière ci-après prescrite, ou sous un mois après la signification de tel ordre, faites à lui ou à ses cautions ; et qu'à défaut de ce faire, il paiera au Demandeur sa dette avec les intérêts et les frais ;.. et après que tel cautionnement aura été ainsi offert et reçu, il sera déchargé de celui qu'il aura donné au shérif. Par la 4e section, " un Défendeur qui aura été ainsi arrêté, *et* " *qui aura donné caution en la manière ci-dessus pres-* " *crite*," est *tenu sous trente jours* à compter du jugement, " de faire et filer dans le bureau du protonotaire ou greffier

un état assermenté indiquant les meubles et immeubles qu'il possède, etc., aux fins que le Demandeur puisse procéder à la saisie-exécution des dits meubles et immeubles, s'il le juge à propos, et indiquant aussi les noms et adresses de ses créanciers, et aussi une déclaration qu'il consent à abandonner à ses créanciers les meubles et immubles mentionnés dans le dit état." Si le Défendeur néglige de produire cet état, ou si dans les deux ans qui suivent sa production, le Demandeur peut établir que l'état est défectueux sous l'un des rapports indiqués, ou enfin si le Défendeur néglige de comparaître pour être interrogé concernant le dit état, la même 4e section porte qu'alors la dite cour, ou en vacance tout juge d'icelle, ordonnera que le Défendeur soit emprisonné dans la prison commune du district pour un temps qui n'excédera pas une année, selon que la cour ou le juge la trouvera raisonnable, *en punition de l'offense* pour laquelle le juge ou la cour aura trouvé le Défendeur coupable ; et si le Défendeur contre lequel il aura été ainsi émané un ordre d'emprisonnement, ne se livre pas de lui-même ou n'est pas livré à cet effet, conformément aux exigences du dit ordre à cet effet, alors les parties qui se seront portées cautions que le Défendeur se remettrait sous la garde du shérif, comme susdit, seront dès ce moment-là tenus de payer au dit Demandeur la dette, les intérêts et les frais, relativement auxquels il aura été donné caution, ainsi que tous les frais subséquents. Selon la 5e section, " il sera *loisible* à tout Défendeur arrêté comme susdit, *et emprisonné*," de présenter semblable état. Il peut le faire "en aucun temps avant ou après jugement." Le Demandeur doit l'attaquer dans les quatre mois à compter de la signification à lui faite, ou à son procureur, d'une copie de tel état et déclaration." Ce délai peut être prolongé de deux mois, soit par la cour, soit par un juge. Si l'état est prouvé être défectueux, sous l'un des rapports indiqués, le Défendeur *en punition de l'offense*, est passible du même emprisonnement dont il a été déjà fait mention. Mais si cette preuve n'est pas établie, " alors il sera loisible à la dite cour ou à tout juge d'icelle, en vacance, à l'expiration de la dite période, d'ordonner la *mise en liberté* du Défendeur." La 6e section autorise la nomination d'un curateur aux biens que le Défendeur " *arrêté* ou *emprisonné* comme susdit," consent ainsi à abandonner. Et dans ce cas " si le Défendeur n'est pas trouvé coupable d'aucune inconduite de nature à l'exposer à une punition, tel que ci-dessus prescrit, tel Défendeur ne pourra dès lors être *arrêté* ou *emprisonné* ou *détenu en prison*, à la poursuite du Demandeur par qui il aura été arrêté, ou à la poursuite d'aucune autre personne, à raison d'aucune cause d'action qui aurait pu originer avant que le dit état et déclaration aient été donnés et filés par le dit Défen-

deur." S'il était à l'avenir arrêté " à raison d'aucune telle cause d'action," il doit être mis en liberté par la cour, ou par un juge, sur requête sommaire." La 8e section établit un nouveau mode de procéder dans chaque cas où un jugement aura été rendu contre un Défendeur, soit avant soit après la passation du présent acte, pour une somme se montant à vingt louis.... " et pour la satisfaction duquel jugement il aurait pu avoir été émané un *writ* de *capias ad satisfaciendum*, conformément aux lois en force dans le Bas-Canada, avant la passation du présent acte." Ce Défendeur, " après discussion de ses meubles et immeubles *apparents*, suivant le cours ordinaire de la loi," est *tenu* de fournir un état de la nature de celui dont il a déjà été question, et ce " sous trente jours à compter de la signification qui lui aurait été faite personnellement d'une copie certifiée de tel jugement, ainsi que d'un avis par écrit le Requérant de donner cet état." A défaut de remplir ce qui est prescrit à cet égard, il devient, *en punition de l'offense*, passible de l'emprisonnement dont il a été fait mention. Toutes les dispositions du statut de 1849, sont déclarées par la 10e section, s'appliquer à toutes les personnes qui, " lors de sa passation, *ou en aucun temps ci-après*, seront détenues dans la prison par et en vertu d'aucun *writ* de *cap. ad resp.* ou *cap. ad satisf.*. et tant à celles qui se sont livrées ou qui se livreront pour décharger leurs cautions, ou qui ont été ou seront livrées par leurs cautions, qu'à toutes autres personnes quelconques." La 9e section avait déjà pourvu à l'élargissement pur et simple des personnes qui, appartenant à la classe de celles qui, par la 1e section, sont entièrement exemptées d'arrestation et d'emprisonnement pour dette, pouvaient être détenues en prison, lors de la passation de cette nouvelle loi, en vertu d'un *writ* de *cap. ad resp.*, ou *cap. ad satisfaciendum*. La 11e section, après avoir dit que le statut n'a pas l'effet d'anéantir les dettes des Défendeurs qui auront procédé ou contre lesquels il aura été procédé ainsi, ajoute : " mais toutes telles dettes continueront d'être les mêmes à tous égards, excepté seulement que le débiteur ne sera pas sujet à être *arrêté* ou *emprisonné* pour raison de telle dette ou dettes, s'il en est expressément exempté en vertu des dispositions du présent acte." La 13e section porte que " depuis et après la passation de cet acte, le cautionnement qui sera reçu par tout shérif pour la comparution de tout Défendeur arrêté et admis à caution, sera et pourra être rédigé d'après la formule contenue dans la cédule n° 4, annexée à cet acte ; " et la 14e " que rien de contenu dans le présent acte n'empêchera aucun shérif de transporter aucun cautionnement qu'il est tenu de recevoir en vertu du présent acte, en la manière que les cautionnements ci-devant reçus par un

shérif pouvaient être transportés." Enfin la 17e section est en ces termes : Je prends la version anglaise, car elle me paraît plus complète que la version française : " All acts and provisions of law repugnant to, or inconsistent with this act, or *which make any provision in any matter provided for by this act*, shall be and are hereby repealed." J'ai cru à propos de faire cette analyse des dispostions du statut de 1849, afin de mieux faire comprendre les raisons sur lesquelles s'appuie la conclusion à laquelle j'en suis venu, relativement à la contestation mue entre les parties. Il est une autre section du statut dont il me faut maintenant parler. C'est la 12e, celle sur laquelle se fonde principalement la prétention des Intimés. Cette section est comme suit : " Rien de contenu dans cet acte " n'empêchera aucune personne arrêtée en vertu d'un *capias* " *ad respondendum*, de donner un *cautionnement spécial à* " *l'action, tel que permis par les lois du Bas-Canada main-* " *tenant en vigueur*, excepté seulement que *le dit cautionne-* " *ment spécial ne sera pas reçu, à moins qu'il ne soit donné* " *le jour du rapport, ou en aucun temps avant le dit jour,* " *ou dans les huit jours qui suivront immédiatement le jour* " *du rapport ;* pourvu toujours, qu'il sera au pouvoir de la " cour, sur demande spéciale, et quand il sera montré une " cause suffisante, de prolonger le temps pour donner tel cau- " tionnement spécial :... et permettre à tout Défendeur qui " aura été arrêté, ou aura donné caution *pour sa comparu-* " *tion le jour du rapport du writ*, de donner caution qu'il se " livrera, selon qu'il est prescrit par la troisième section de cet " acte, même après la période prescrite à cet égard par la " dite troisième section de cet acte."

Je ne pense pas que cette clause doive recevoir l'interprétation que les Intimés lui ont donnée. Cette interprétation aurait l'effet de *nullifier* plusieurs des dispositions du statut. Pour justifier cette remarque, je devrais peut-être me contenter de renvoyer aux arguments employés par l'Appelant dans son excellent factum, arguments qui me paraissent être irrésistibles. J'en ajouterai cependant quelques-uns que l'abondance de la matière a pu lui faire perdre de vue. Les dispositions du statut justifient pleinement ce que son titre annonce : " Acte pour abolir l'emprisonnement pour dette." Le créancier n'a plus d'exécution contre la *personne* de son débiteur ; c'est-à-dire, qu'il n'a plus le droit, à son gré, de le détenir indéfiniment en prison, jusqu'au paiement de sa créance. S'il peut encore l'arrêter, ce n'est que provisoirement. Cette arrestation ne peut avoir qu'un effet temporaire ; il est au pouvoir du débiteur, en remplissant certaines formalités, de l'anéantir pour toujours, même d'obtenir son élargissement pur et simple de la prison, contre le gré du créancier, et de se soustraire à toute

nouvelle arrestation pour la même cause. Les relations du créancier et du débiteur sont donc bien changées. Ce sont des dispositions tout à fait nouvelles, qui règlent non seulement les cas où l'arrestation d'un débiteur peut encore avoir lieu, et le temps où cette arrestation doit prendre fin, mais encore la nature, la forme, les conditions et les effets des cautionnements que le débiteur ainsi mis en état d'arrestation, a la faculté de donner, pour obtenir sa mise en liberté provisoirement, jusqu'à ce qu'après l'accomplissement de certaines formalités, cette mise en liberté devienne complète ou absolue. Mais ces formalités, si le Défendeur veut en avoir le profit, il faut qu'il les accomplisse.

Examinons maintenant quelques-unes de ces formalités dans leur application à l'espèce; et ne perdons pas de vue que la condition du cautionnement dont il s'agit, donné plusieurs mois après le jugement rendu contre Atkins, est que celui-ci ne quittera pas le *Bas-Canada*, sans avoir payé la dette, l'intérêt et les frais. Ce cautionnement, conforme aux dispositions de l'acte de la 5e Geo. IV, chap. 2, ne peut plus être offert ni reçu depuis la promulgation de l'acte de 1849. 1° Lorsqu'il y avait lieu de donner un tel cautionnement, c'était lorsque le débiteur pouvait être arrête *causâ meditationis fugæ* du *Bas-Canada*. Cette arrestation, pour une telle cause, n'est plus permise. Il faut, pour que l'arrestation soit valablement faite, qu'il soit attesté sous serment, " que le Défendeur est sur le point de laisser immédiatement *la province du Canada*, avec l'intention etc., etc."; ce qui comprend, non seulement le Bas-Canada, mais encore le Haut-Canada. Le débiteur peut donc aller dans le Haut-Canada, sans que son créancier ait, pour cela même, aucun motif valable de l'arrêter. Si le cautionnement invoqué par les Intimés est valable, c'est-à-dire, que le débiteur ne quittera pas le Bas-Canada, alors le créancier acquiert, par la loi, contre lui et ses cautions, un droit rigoureux qu'il n'avait pas auparavant, et que la loi ne lui permettait pas d'acquérir, s'il se fût borné à dire et à établir sous serment que ce débiteur était sur le point de quitter le *Bas-Canada*. Si, avant l'arrestation le créancier ne pouvait avoir recours à cette voie coercitive, sous le prétexte que son débiteur avait l'intention d'aller dans le Haut-Canada, comment se rendre compte de la validité d'un pareil cautionnement qui rend les cautions du débiteur passibles de sa dette, par cela même qu'il quitte le Bas-Canada, lorsque ce débiteur a été arrêté sous le prétexte qu'il allait laisser le Haut et le Bas-Canada, et que, cependant, il n'avait intention que d'aller dans le Haut-Canada ? L'on voit de suite que ceci conduit à l'absurde ; et l'on doit voir, par conséquent, qu'il n'est plus permis de donner un cautionnement semblable à celui qui est

invoqué par les Intimés. La nouvelle loi a étendu la liberté du débiteur; elle a par cela même révoqué la disposition antérieure qui restreignait cette liberté, disposition qu'il n'est pas au pouvoir d'un Defendeur de faire revivre à son propre gré. 2° Un cautionnement que le débiteur ne quittera pas le Bas-Canada, donné sous l'autorité de la 5e Geo. IV, chap. 2, est valable, ou non. S'il est valable, alors ce débiteur est soustrait à l'opération du statut de 1849, et, par conséquent, à l'obligation de fournir dans un temps donné. l'état de ses biens. Cette partie de la nouvelle loi est donc *nullifiée*. Cependant le législateur a voulu qu'il en fût autrement. Il a voulu que le débiteur, exposé à l'arrestation, fût, néanmoins, dans un court délai, libéré de cette arrestation et de ses conséquences. Il a voulu que, pour cela, le débiteur fût obligé de faire une *cession de biens*, qui, étant régulièrement faite, ne laisse aux créanciers de recours que sur ces mêmes biens, et anéantit, par cela même, l'arrestation, l'emprisonnement et les cautionnements qui ont précédé. Le système d'argumentation des Intimés renverse tout cela; c'est-à-dire, les principales dispositions de la loi de 1849, ne peuvent pas, dans ce système, recevoir d'exécution, et cela pour le bon plaisir et au gré du débiteur lui-même. Le moins que je puisse dire, c'est qu'une telle proposition me parait être tout à fait insoutenable. 3° Toutes les dispositions du statut de 1849, sont incompatibles, *inconsistantes*, avec celle de la 5e Geo. IV, chap. 2, qui autorisait un cautionnement sous la condition que le Défendeur ne quitterait pas le Bas-Canada, et, par conséquent, cette dernière disposition est abrogée. Comme par le passé, le débiteur arrêté peut encore offrir au shérif un cautionnement pour sa comparution. La formule de ce cautionnement est indiquée dans la cédule No 4, annexée à l'acte de 1849. C'est le cautionnement que Atkins a donné au shérif, le 7 décembre 1854, jour de son arrestation, et que j'ai rapporté plus haut. Il n'y est nullement question de faire dépendre l'obligation des cautions, du départ du débiteur du Bas-Canada. Ce cautionnement, est-il dit, " sera nul et de nul effet, si le Défendeur donne, le jour du rapport du bref de sommation, ou *en aucun temps auparavant*, ou *dans les huit jours après*, bonne et suffisante caution, (tel que déjà expliqué), qu'il se livrera sous la garde du shérif aussitôt qu'il en sera requis, ou qu'à défaut de ce faire, il paiera la dette avec les intérêts et les frais; ou que, s'il donne, le jour du dit rapport, ou en aucun temps avec cette époque, ou dans les huit jours qni suivront le jour du dit rapport un cautionnement *spécial*, tel que prescrit par la loi." Autrement, est-il ajouté, le cautionnement ainsi donné au shérif sera " en pleine force, vigueur et effet." Ce cautionnement que Atkins s'obligeait ainsi envers le shérif de donner *en second lieu*, pour se

libérer du premier, et que, cependant, il n'a jamais donné, était le cautionnement qui, d'après la dernière partie de la 3e section du statut de 1849, peut être offert par le Défendeur arrêté, *qui a déjà donné cautions au shérif*, mais non le cautionnement ci-devant autorisé par la 5e Geo. IV., chap. 2. Et puis, ce cautionnement qui pouvait être ainsi offert en second lieu par Atkins, et qui est le cautionnement spécial dont il est fait mention dans la 12e section du statut, sur laquelle se reposent les Intimés, ne pouvait, aux termes de cette même section, être reçu "à moins qu'il ne fût donné le jour du rapport, ou en aucun temps avant le dit jour, ou dans les huit jours qui ont suivi immédiatement le jour du rapport." A défaut de la présentation d'un tel cautionnement, le premier, celui donné par Atkins au shérif, est demeuré "en pleine force, vigueur et effet;" et le shérif pouvait légalement le transporter au Demandeur (sect. 14). C'est la garantie que le créancier acquiert, lorsque le Défendeur arrêté et admis à caution, ne veut pas profiter du droit qu'il a de donner le second cautionnement qui doit mettre fin au premier. Le statut dit expressément (sect. 3.): "et après que tel cautionnement aura été ainsi offert et reçu (c'est-à-dire celui autorisé par cette même section), le Défendeur sera déchargé de celui qu'il aura donné au shérif." Donc, s'il ne donne pas le second cautionnement, il n'est pas déchargé du premier. De plus, ce second cautionnement est celui qui est prescrit par la 3e section. S'il eût été donné par Atkins, ainsi qu'il avait le droit de l'offrir, assurément on n'ira pas jusqu'à prétendre qu'il dût, en sus, donner la cautionnement prescrit par la 5e Geo. IV. Ainsi, pour le même cas identique, le statut de 1849, a fait une disposition *autre* que celle contenue dans la loi de 1825. Donc, aux termes de la dernière section du statut, la disposition de la loi de 1825 est *abrogée*. 4° Mais les Intimés disent: la 12e section du statut de 1849, déclare que rien dans cet acte n'empêchera de donner un cautionnement spécial à l'action "tel que permis par les lois du Bas-Canada maintenant en vigueur;" et par ces derniers mots, un Défendeur arrêté conserve le droit qu'il avait, sous l'autorité de la 5e Geo. IV, de donner caution qu'il ne quittera pas le Bas-Canada. Soit. Alors deux choses à considérer: Ou un tel cautionnement prend la place de celui que Atkins s'était obligé envers le shérif de donner plus tard, et qui est prescrit par la 3e section, ou il ne la prend pas. Au premier cas, le Défendeur ne fournit pas ce dernier cautionnement; il ne procède pas sous l'autorité de la 3e section qui ne fait aucune mention d'un cautionnement de ne pas quitter le Bas-Canada. Il ne tombe donc pas sous la disposition de la 4e section, qui ne peut atteindre que "le Défendeur qui

aura été ainsi arrêté, et qui aura donné caution en la manière *ci-dessus prescrite*," c'est-à-dire, le cautionnement prescrit par la 3e section. Atkins est donc soustrait à l'obligation de produire un état de ses meubles et immeubles, et de faire une cession de ses biens qui alors ne pourront pas être mis sous la garde d'un curateur. La nouvelle loi est donc paralysée dans plusieurs de ses dispositions les plus importantes, par d'autres dispositions antérieures qui lui sont contraires. Cependant la dernière section de cette loi porte que toutes dispositions ainsi contraires seront *abrogées*. Au second cas, c'est-à-dire, si le cautionnement donné par Atkins de ne pas quitter le Bas-Canada, ne prend point la place de celui que prescrit la 3e section du statut de 1849, et qu'il s'était obligé de donner en second lieu pour être déchargé de son cautionnement au shérif, alors Atkins n'en continue pas moins d'être atteint par toutes les dispositions de la nouvelle loi. Pour être déchargé de son cautionnement au shérif, il devait donner celui que la 3e section lui permettait de donner. Ne l'ayant point fait, son premier cautionnement est demeuré en pleine force et vigueur. 5° Supposons encore que la 12e section du statut de 1849, ait conservé au Défendeur le droit de donner le cautionnement autorisé par la loi de 1825. Suivant cette loi, ce cautionnement pouvait être donné " en aucun temps avant ou après jugement." La 12e section du nouveau statut déclare expressément " que le dit cautionnement spécial ne sera pas reçu à moins qu'il ne soit donné le jour du rapport, ou en aucun temps avant le dit jour, ou dans les huit jours qui suivront immédiatement le jour du rapport." Sous le rapport du délai, le nouveau statut contient une disposition *autre* que celle de la loi de 1825. Donc cette disposition antérieure se trouve *abrogée*. Mais l'on dit: la 12e section permet à la cour," sur demande spéciale, et quand il sera montré une cause suffisante, de prolonger le temps pour donner tel cautionnement spécial." Et c'est ce que Atkins a obtenu. Oui, mais seulement plus de six mois après le jugement rendu contre lui en faveur de Hoffman. La cour pouvait-elle alors lui accorder la permission de donner le cautionnement? Cette question me ramène nécessairement aux deux cas que j'ai déjà posés: ou ce cautionnement prend la place de celui de la 3e section, ou il ne la prend pas. S'il ne la prend pas, j'ai déjà fait voir que Atkins ayant continué d'être atteint par toutes dispositions du nouveau statut, son cautionnement au shérif est forfait au profit de son créancier à qui le shérif l'a transporté. Si au contraire le cautionnement dont il s'agit, prend la place de celui de la 3e section du statut, et qu'il doive, comme le prétendent les Intimés, avoir l'effet d'anéantir celui donné au shérif, il faut dire que c'est parce que la

12e section étant, dans ce cas, censée rétroagir sur la 3e, le cautionnement que l'on prétend qu'elle permet de donner, est censé à son tour avoir été prescrit par la 3e section, et en remplir l'objet pour toutes les fins du statut de 1849, car ce n'est qu'alors que Atkins pourrait invoquer, comme applicable à l'espèce, la dernière partie de la 3e section, savoir: " et après que tel cautionnement aura été ainsi offert et reçu, le Défendeur sera déchargé de celui qu'il aura donné au shérif." S'il en est ainsi, Atkins tombe sous la disposition de la 4e section du statut qui l'oblige de produire un état de ses meubles et immeubles, et de faire une cession de ses biens. Cet état, le Défendeur est tenu de le produire " sous trente jours à compter de celui où le jugement aura été prononcé," sinon il est passible d'emprisonnement. D'un autre côté, si l'état est produit à temps et qu'il soit sincère, le Défendeur obtient tout le bénéfice du statut, qui le libère de toute arrestation et de toute contrainte. Mais pour qu'un Défendeur soit admis à produire l'état voulu, en vue de parvenir à cette libération, il faut qu'il ait donné caution en la manière prescrite par la 3e section, lequel cautionnement, comme on l'a vu, l'a déjà libéré de celui qu'il avait donné au shérif. Ainsi, dans l'hypothèse ci-dessus posée que le cautionnement donné par Atkins est censé avoir été prescrit par la 3e section et en remplir le but, il est évident qu'un tel cautionnement devait être donné, dans tous les cas, avant l'expiration du délai de trente jours à compter du jugement accordé au Défendeur pour produire l'état en question. La demande d'une prolongation du délai pour donner cautionnement spécial, telle qu'autorisée par la 12e section, si elle ne dût pas être faite et accordée avant l'expiration des huit jours qui suivaient le rapport du *capias* doit donc l'être au moins avant l'expiration des susdits trente jours. Etendre au-delà de cette limite le pouvoir discrétionnaire qui est donné à la cour par la 12e section, ce serait lui permettre, à son gré, de paralyser les dispositions de la loi, et de changer les relations du débiteur et du créancier. Je suis même porté à dire que l'esprit de la loi est que la prolongation du délai doit être demandée avant l'expiration des huit jours qui suivent le rapport, ou du moins avant le jugement final, c'est-à-dire, dans un temps où le tribunal est encore saisi de la cause. (9 *D. T. B. C.*, p. 74.)

ANDREWS, CAMPBELL and ANDREWS, for Appellant.

STUART and VANNOVOUS, for Respondent.

VENTE.—GARANTIE.

SUPERIOR COURT, Montréal, 31 décembre 1858.

Before SMITH, Justice.

DESJARDINS *vs.* LA BANQUE DU PEUPLE.

Jugé : 1° Qu'une action portée par un adjudicataire de biens immeubles contre un Demandeur, poursuivant le décret, pour recouvrer la valeur d'un déficit dans la quantité du terrain, ne peut être portée, sans que ce déficit ait été au préalable établi dans une action pour réformer le titre du shérif accordé à l'*adjudicataire*, et faire corriger la description du terrain, laquelle action doit être dirigée contre le poursuivant et le saisi. (1)

2° Que jusqu'à ce que ce déficit soit constaté, le titre accordé par le shérif empêche qu'aucune action personnelle puisse être portée contre le Demandeur, poursuivant le décret, comme ayant touché le produit de la vente, et ce titre fait foi entre le Demandeur et le Défendeur, tant qu'il n'est pas mis de côté ou réformé.

The declaration set up a sheriff's title of the 8th November, 1853, to Plaintiff, as *adjudicataire* of certain real property sold in a cause n° 60, *Banque du Peuple* vs. *Donegani*, for the sum of eleven hundred pounds, the description of the property being as follows " une terre en fief relevant à foi et " hommage, située à l'extrémité ouest de l'isle Perrot, sur la " côte opposée à *Vaudreuil*, contenant quatre cents arpents, " c'est-à-dire tout ce qui peut se trouver dans les limites sui- " vantes, à partir de la ligne de Jean Moreau, au sud-ouest, " suivant le bras de la rivière séparant la dite isle Perrot de " l'isle de Montréal, et s'étendant, vers le nord-est, au terrain " des représentant Tannisse, de là, allant dans une direction " sud-est, le long de la ligne des représentants Tannisse, jus- " qu'à l'intersection de la dite ligne avec celle de Joseph La- " lande, avec une maison, hangar et autres bâtisses dessus " con struites. " That the purchase money was returned into court, and was paid over to the Bank, under a judgment of distribution of the 7th February, 1854, that the land, instead of containing four hundred arpents, contained only one hundred and eighty-eight arpents; that the payment of eleven hundred pounds was made by error, and from the Plaintiff's ignorance of the deficiency referred to, and that the land was not worth, at the most, more than a sum having the same proportion to the price paid, as the actual extent, one hundred and eighty eight arpents, has to the four hundred arpents over sold, and that Plaintiff had consequently suffered a loss of £583, and the Bank gained a like amount, for which Plaintiff prayed judgment, reserving the right to demand, if

(1) V. Art. 1501 C. C.

necessary, the *nullité du décret.* The Defendant pleaded a *défense au fonds en droit,* based on the following reasons: 1st. The Bank was not bound to indemnify Plaintiff, simply from the fact of the Bank being Plaintiff in the suit in which the property was sold; 2nd, No allegation of fraud; 3rd, Nor that the Bank had profited otherwise than as the creditor of Donegani; 4th. That Plaintiff's allegations shewed that it was not the Bank, but Donegani, who had profited, and that the suit should have been directed against him. The Defendant further pleaded by exception. 1stly. That the Bank had nothing to do with giving the description of the property which the sheriff obtained from Donegani and others, that the land was sold as a *corps certain,* " ce qui pouvait se trouver," that Plaintiff had visited the property, and was aware of its contents, that his recourse was against the sheriff or Donegani, or at all events that the latter should be put into the cause, that the bank was a creditor of Donegani's to the extent of £30,000, and received by the judgment of distribution £20,930 8 1, which included £1048 13 4, part only of the £1100, the rest being distributed for costs, etc. That shortly after his purchase Plaintiff measured the property, but failed to notify the Bank of any deficiency, and that had such notification been made, the Bank could have secured itself on stock then held in the Bank by Donegani, who was now insolvent; that Plaintiff had lost any recourse by not exercising it within a reasonable time; 2dly, That since the sale Plaintiff had received from the Grand Trunk Railway Company £600, for part of the fief over which their road passes, and £300 for wood and materials, and had cut divers large quantities of timber, and that instead of the action brought, he only could have an action to set aside, *résilier,* the sale, on offering to account for what he had received. Conclusions for dismissal of action; 3dly, That the fief sold included several buildings, also a right of ferry from Isle Perrot to Vaudreuil of great value. Conclusions for an evaluation by experts. The answers of Plaintiff were general, except that, to the *second* exception, an answer in law was filed on two grounds: 1st, That, even if the allegations were true, the action could not be dismissed: 2nd, That the Bank, as Plaintiff pursuing the adjudication, was liable to pay a compensation for the deficiency, and that the now Plaintiff had his choice, either between the action *en nullité de décret,* or the action as now brought, and was not bound in law to account for, *rapporter,* the profits. The *défense en droit* was dismissed on the 30th April, 1858, C. Mondelet, J., and proof ordered on the exception (1).

(1) " Considérant que la défense en droit plaidée par la Défenderesse est " mal fondée, en autant qu'il est allégué par le Demandeur en sa déclaration

Several witnesses were examined, and the report of a surveyor filed, shewing the property to contain one hundred and seventy-nine arpents and seventy-seven perches.

SMITH, Justice: The first question to be determined is whether a party who is collocated for monies by a judgment of distribution is liable to an *adjudicataire* to refund, in case of a deficiency in the immoveable sold, as a vendor would be in an action *quanti minoris*. The authorities are to the effect, that in France, a party can come upon the person last collocated, on the presumption that such person had received the amount, and is bound to refund. It is held also that the action will lie against Plaintiff, *poursuivant le décret*, as *garant* of the adjudicataire, if the cause of the loss is attributable to him, I adopt these views and think them sustained by authority. But, in this case, the land passed by the sheriff's sale, and there is a deficiency in the quantity conveyed by the sheriff. Plaintiff claims *de plano* against the Bank, in an action purely personal, without in any way attempting to reform or correct his own title received from the sheriff. Does an action lie, as now brought? I think not. This is not the mode which should have been adopted. Proceedings should have been taken to rectify the *décret*. The formalities of the old French law as to seizures, are not in force here. We have no *commissaires aux saisies réelles*, and the statutory provisions in force are extremely meagre. But it is clear that it is the sheriffs' duty to seize and also to give title to *adjudicataire*, which title represents that given by the commissaires. The sheriff makes the sale in fact for the debtor; his title is the title which the debtor could have given, and which the law forces him to give.. He is the agent of the *saisi* and the title when given is authentic and must be taken to be so, and to be binding between the parties to it. How then can an action be brought, *de plano*, on an alleged deficiency against a recipient of the money when the very title which Plaintiff has taken from the sheriff is not in any way impugned or sought to be corrected or reformed. In so far as Plaintiff is concerned as *adjudicataire*, it is conclusive against him, until the error, if any exist, is rectified. In my opinion, the *décret* must be rectified, if the party is evicted, or if

" que l'immeuble dont il y est question a été vendu par le shérif au Deman-
" deur par le contenu, et non comme corps certain, suivant que le prétend la
" Défenderesse, et que la Défenderesse ayant reçu bien au delà de ce que le
" Demandeur aurait été en loi obligé, et le serait, de payer sur la dite vente,
" et qu'ainsi, d'après les allégués de la déclaration du Demandeur, la Défen-
" deresse a profité aux dépens du Demandeur, et est tenu de le rembourser
" jusqu'à concurrence de ce qu'elle a reçu : Considérant que le Demandeur,
" par les allégués de sa déclaration, est en droit, s'il en fait la preuve, de ré-
" péter de la Défenderesse telles sommes d'argent qu'il établira avoir été
" reçues par elle la Défenderesse, et dont ellé aurait profité aux dépens et au
" préjudice du Demandeur ; déboute la défense en droit.

(which amounts to the same thing) there is a deficiency in the land purchased, before an action of this sort can be brought. All parties interested must be before the court, Defendant as having been represented by the sheriff, Plaintiff as *poursuivant le décret* and Plaintiff as *adjudicataire*, and the court would then be in a position to decide. If there is a deficiency so ascertained, then the action would lie. It is the *nullité de décret* which gives rise to the action, and it is by the petition *en nullité* or *en rectification* that Plaintiff should have commenced. The *décret* and the title of the *adjudicataire* would be thus set right, and the deficiency of the land being thus ascertained, the *adjudicataire* would have his recourse against the party or parties who may have received the monies. This appears from the authorities (1).

JUDGMENT: " Considering that Plaintiff hath failed to esta-
" blish that by law any such action as that which is now
" brought to recover from Defendant the value of the defi-
" ciency of the quantity of land claimed by the present action
" exists in law ; and, further, considering that such deficiency
" of land, the value of which is now sought to be recovered,
" can only be legally settled by an action to reform or correct
" the description of the quantity of land stated in the title to
" the said land to have been conveyed by the sheriff of the
" district to Plaintiff, under the adjudication made by the
" said sheriff by authority of law; and, futher, considering that,
" for the purposes of conveying the title to the land so sold
" and adjudicated, the sheriff is by law the representative of
" the party Defendant on whom the adjudication was made,
" and that such deficiency, if any exists in the land so con-
" veyed, can only be ascertained in an action in which the
" said *saisi* is a party, as being in law considered the vendor,
" acting by the said sheriff, as aforesaid, together with the
" *poursuivant le décret*, who alone, in such a case, as parties
" to the adjudication, are *légitimes contradicteurs* in such con-
" testation. And, further, considering that, until such defi-
" ciency shall have been so established, the title granted by
" the sheriff operates as a bar to any action merely personal
" against Plaintiff, as having received the proceeds of the sale
" and adjudication of the land, as being in full force and
" effect, and conclusive evidence in law between Plaintiff and
" Defendant of the truth of its contents, until it shall have
" been legally set aside or reformed. The Court doth dismiss
" the action of said Plaintiff." (9 *D. T. B. C.*, p. 118, et 3 *J.*, p. 75.)

LAFLAMME, LAFLAMME and BARNARD, for Plaintiff.

CHERRIER, DORION and DORION, for Defendant.

(1) Héricourt, p. 302 ; Rép de Juris., *vbo* Adjudication, p. 165 ; 2 Bourjon, *Criées*, art. 131, p, 731 ; Nouv. Den., p. 37, n° 7.

DECRET.—DEFAUT DE CONTENANCE.—GARANTIE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 31 mai 1860.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL, MONDELET, A. J., et BADGLEY, A. J. Justices.

DESJARDINS, Appellant, and LA BANQUE DU PEUPLE, Respondent.

En novembre 1853, le Demandeur se porta adjudicataire, pour £1100, d'un fief vendu par décret, à la poursuite de *La Banque du Peuple* vs. *Donegani;* par jugement de distribution, il fut ordonné que le produit de la vente serait payé à la banque Opposante dans la cause.

Par arpentage fait par l'adjudicataire, le 15 janvier 1857, il fut constaté que la propriété désignée comme contenant 400 arpents, n'en contenait que 188; le 15 septembre 1857, l'adjudicataire porta son action contre la banque pour £583 étant la réduction sur le prix, en proportion au défaut de contenance.

Jugé: 1. Que l'action avait été instituée dans un délai raisonnable, nonobstant l'insolvabilité de Donegani, et que la banque avait le 27 mars 1857, reçu de Quesnel, cessionnaire de Donegani, £4053 13 balance de ce qui était dû par Donegani à la banque, et sur ce reconnu et accepté un transport de 392 actions de la dite banque, au nom de Donegani, lesquelles actions, aux termes de son acte d'incorporation, Donegani, comme actionnaire, n'eut pu transporter sans s'acquitter d'abord de ce qu'il devait à la banque.

2. Qu'il n'était pas nécessaire de mettre le Défendeur dans la première *action*, Donegani, en cause.

3. Que l'adjudicataire ayant par erreur quant à la contenance de la propriété, payé le montant en entier de son adjudication, et la banque, Opposante dans la cause, l'ayant reçu, était tenu de remettre l'excédant.

Le jugement de la Cour Supérieure est reporté ci-dessus, p. 135.

LAFONTAINE, J.-en-C.: Un arpenteur a été nommé, du consentement des parties, pour constater le défaut de contenance. Cet arpenteur a rapporté que le déficit était plus grand que celui allégué dans la déclaration du Demandeur, le terrain possédé par lui ne contenait réellement que 179 arpents et 67 perches en superficie. Quoi qu'il en puisse être, le Demandeur est lié par l'énoncé de sa déclaration. La terre était en bois debout; il était très difficile à un étranger d'en connaître l'étendue ou la contenance. La banque l'a fait saisir et annoncer en vente comme contenant 400 arpents. Selon la déclaration du Demandeur, elle n'en contient que 188, ce qui fait un déficit de 212 arpents; ce déficit est même prouvé être plus grand. Dans tous les cas, un déficit de 212 arpents est assez considérable pour qu'il soit raisonnable et juste que l'adjudicataire ait en pareil cas droit d'action. On lit, aux *observations* sur Du Perrier, t. 2, p. 337: " Si la vente commence par l'expression de la quantité et étendue du fonds vendu, avant qu'il soit fait mention des confins et limites, la vente est censée faite *ad mensuram, non ad corpus;* et par conséquent le vendeur est tenu

de suppléer ce qui peut manquer à cette quantité." Il ne s'agit pas ici d'une action révocatoire. Le Demandeur tient à son acquisition pour la quantité de terrain qu'on lui a livrée. Ce dont il se plaint, c'est qu'on ne lui a pas livré tout le terrain promis, qu'on a voulu lui vendre et qu'il a voulu acheter. Par suite de l'erreur ainsi commise, constatée par le défaut de contenance, il se trouve avoir payé ce qu'il n'aurait pas dû payer, et la banque se trouve avoir reçu, à son préjudice, ce qu'elle n'aurait pas dû recevoir, ce qu'elle n'avait pas le droit de recevoir. Ainsi, le Demandeur est bien fondé à répéter d'elle ce qu'elle a ainsi reçu induement. La proposition exacte de la quantité du *déficit* allégué dans le prix payé, £1100, est de £583, la somme précise réclamée par l'action. Je crois que le Demandeur aurait dû avoir jugement pour cette somme sans aucune déduction. La valeur des prétendues bâtisses est prouvée être nulle ; cette valeur n'équivaut pas même au coût des réparations que le Demandeur y a faites. La traverse de l'isle Perrot à Vaudreuil n'a pas fait, et ne pouvait pas faire partie de la vente. Les profits minimes qu'il est établi que le Demandeur a pu faire, depuis son acquisition, par la vente du bois et d'une partie du terrain au Grand-Tronc, n'ont rien à faire à la question. Eût-il fait des milliers de louis par ce moyen, cela n'affecterait en rien la créance que lui donne le défaut de contenance de la chose qu'on lui a vendue. Je ne trouve non plus aucune force dans l'exception de l'Intimée, que, n'ayant pas reçu promptement avis du défaut de contenance, elle a été portée à renoncer au privilège qu'elle avait sur les parts en banque de Donegani, et à accepter le transport du cessionnaire. Avant d'accepter ce transport, elle a été payée par le cessionnaire de la balance que lui devait son débiteur. Elle n'a donc rien perdu. Il reste la conclusion de la dernière exception de l'Intimée, par laquelle elle demande une expertise. Elle veut qu'on lui permette de faire estimer une chose qui n'existe pas. Ce serait, il faut l'avouer, un peu trop difficile. Il n'y a pas lieu à expertise. L'Intimée, tenue personnellement au remboursement envers le Demandeur, car il n'y a pas de prescription (il y aurait peut-être tout au plus celle de dix ans), avait un recours en garantie, ou un recours contre quelqu'un. Si elle n'a pas jugé à propos d'intenter son action récursoire pour le faire juger conjointement avec l'action du Demandeur, elle pourra l'intenter plus tard. Il est à remarquer de plus que, dans une de ses exceptions, l'Intimée dit que, aussitôt après la vente, l'Appelant avait pris possession du terrain, et que, *peu de temps après*, il l'avait fait chaîner et mesurer pour le diviser en lots et en disposer. Elle prouve le fait, et elle prouve que cela a eu lieu en janvier 1857. C'est ce qu'elle appelle elle-même *peu de temps après*. C'est donc, suivant elle, dans un délai

raisonnable que ce mesurage a eu lieu. Elle n'est donc pas fondée à s'en plaindre aujourd'hui. C'est quelques mois après et après une longue maladie soufferte par le Demandeur, que celui-ci a informé la banque du défaut constaté dans la contenance. Il me semble que, dans ce cas, l'avis a été donné dans un temps raisonnable.

MONDELET, A. J. : L'examen de cette cause me conduit au résultat qui suit : 1° L'action n'en est pas une révocatoire ; par conséquent, la prétention de l'Intimée que Donegani et le shérif auraient dû être mis en cause, est sans fondement ; 2° Il n'y a pas de prescription quant à cette action par l'ancien droit, bien que le code se montre peut-être moins favorable aux prétentions du Demandeur. Les prescriptions sont de droit étroit, et la cour ne les crée pas ; 3° Par suite de ce qui précède, que la Banque du Peuple perde ou gagne moins à cela, il n'importe ; la question est de savoir si elle a reçu plus qu'elle n'avait droit de recevoir. Elle ne peut, plus que qui que ce soit, s'enrichir aux dépens d'autrui, et assurément qu'il est de droit, que celui qui se plaint du *déficit* peut être et doit être reçu à se faire rembourser contre les créanciers qui ont été colloqués ; 4° Si l'Intimée, qui a excipé du droit d'autrui, voulait faire rejaillir sur Donegani et le shérif la condamnation de restitution, c'était à elle à demander à les appeler en cause ; 5° Quant à la question du contenu et des limites, il me paraît évident, que la vente a été d'une étendue de 400 arpents et non d'un corps certain, et qu'attendu le *déficit* qui ne laisse à Desjardins que 188 arpents, qui représentent les £583, dont toutefois il faut déduire £40 pour autant qu'est établie la valeur des propriétés, le jugement de la cour de première instance, qui est basé sur le faux principe qu'il n'y a pas en loi une telle action, sans que Donegani et le shérif soient mis en cause, doit être renversé, et la Banque du Peuple, condamnée à payer, etc., à Desjardins £543, avec intérêt du 8 novembre 1853, date du contrat du shérif.

BADGLEY, J. : The action is simple in its character, and it may be at once observed that no difficulty exists as to the facts. The Appellant has no desire to interfere between the creditor and the debtor, as to the proceeds of the actual lot sold, he only claims to be restored the amount which he paid by error for what he did not receive ; and which was not in fact in existence, when adjudged to him by the decret at the suit of Respondent. The action is direct against Respondent, the receiving creditor of the proceeds of the debtor's property, actually sold at their suit, and claims from them the restitution of the excess paid to and appropriated by them, for property which had no existence whatever, and which excess they could not hold under the legal fiction that it represented

their debtor's property. That in such case the direct action has been properly brought against the recipient of the excess is attested by authority; two or three citations will suffice. Guyot, *Rép.* vo *Adjudicataire*, p. 169: " D'autres croient que les créanciers colloqués recevant les deniers seraient obligés de rendre à l'adjudicataire ce qu'ils auraient touché jusqu'à la concurrence de la somme fixée pour l'indemnité, et cette dernière opinion doit être préférée. Il est juste que ceux qui ont fait vendre un bien en justice pour être payé ce qui leur était dû, et qui en ont touché le prix, fassent jouir l'adjudicataire ou qu'ils lui restituent ce qu'ils en ont touché." Pothier, *Proc. civ.*, p. 227: " Par notre jurisprudence on donne cette répétition contre les créanciers qui ont touché à l'ordre, et lorsque l'action n'a été que pour partie il n'y a répétition que pour la partie du prix, ce sont les derniers recevants à l'ordre qui sont seuls tenus de cette répétition du prix." 1 Duvergier, p. 417, n° 346: " Pourra-t-il forcer les créanciers entre les mains desquels le prix aura été versé à le lui restituer, non pas comme exerçant l'action en garantie, mais comme réclamant ce qu'il a payé par erreur. La plupart des auteurs pensent que la restitution peut être exigée, etc." See also 1 Troplong, *Vente*, n° 432, pp. 549, 550, who cites Poth., *Proc. civ.*, also n° 498, p. 629; 10 Poulain du Parc, p. 655, n° 55, etc., etc. This concurrence of legal opinion, which is nothing but the plainest equity and honesty, in support of the direct action against the receiving creditor, the last in the collocation order, establishes this point, and the reason upon which it is founded is so plain and manifest as to remove all doubt upon the subject. Why is the receiving creditor liable to refund to the paying purchaser, because " l'adjudicataire n'était débiteur du prix envers les créanciers qu'à cause de l'immeuble dont il croyait avoir acquis la propriété, du moment où il est évincé de cet immeuble, il est démontré que l'origine de sa dette envers les créanciers du saisi et le paiement qu'il en avait fait n'étaient fondés que sur une erreur, et par cela même il est autorisé à répéter les deniers des mains de ceux à qui il les a payés. Lorsqu'une personne, qui par erreur se croyait débitrice, a acquitté une dette, elle a le droit de répétition contre le créancier." The relative positions of the receiving creditor and paying adjudicataire with reference to land adjudged by the sheriff which could not be put into the possession of the latter from the simple fact of its non-existence, is that of a vendor and vendee, the sheriff acting only as official salesman for the former. In this case the vendee has been put in possession of the adjudged lot which has been established by measurements to contain only 188 arpents instead of the 400 arpents advertised and adjudged,

and the Respondent, the seizing and last collocated creditor, has received and appropriated his £1100, which he in good faith, but by error, paid for the advertised 400 arpents, of which only 188 had existence, and for which, as their debtor's property, they should have received only £517 as its estimated value according to the full price paid for the full lot. This is a distinct *condition* between the payer and the payee, in which the debtor, Mr. Donegani, can have no interest unless he could be compelled to make the 188 arpents actually transferred, increase to 400 actually sold. Had he been made a party to the suit, what could have been required of him, what judgment could have been rendered against him ? Not to increase the particular lot sold, which was impossible ; not to repay to the purchaser the excess overpaid for land, which was not his, and which in fact did not exist, and which excess, moreover, he had not received, what was his guarantee under these circumstances ? Possibly to his creditor, but certainly in no way to the purchaser of non-existing property, the adjudicataire whose money had been received by the Respondent as the representative of the debtor's property, which did not exist. The Respondent holds this money without title, it does not represent any right or property of the debtor, and has been paid by error by the Appellant. It is not a question of *garantie*, nor has the Plaintiff been barred by time from bringing the cause before the court. Considering the case simply as it is, a demand against the Respondent for receiving money by error paid to them, and representative of no value whatever, or of any property of the debtor, and that it is held by the Respondent for the use and benefit of the Appellant, common honesty and justice require that the judgment of the Superior Court should be set aside, and, concurring with the chief-justice, the appeal in this case must be maintained.

AYLWIN, J., *dissentiens :* The Defendant, Donegani, should have been in the cause. The action is not rightly brought against the Bank alone. The action should have been a special one. Furthermore this was a sale *per aversionem*, a *corpus certum*, it was *ager limitatus*, and the Appellant bought what he saw. There is another matter. The Bank was the last creditor to be paid, and only received a portion of the money on giving security, and yet here the condemnation is absolute.

DUVAL, J., *dissentiens :* The action ought to have been against Donegani in the first instance. The *adjudicataire* has nothing to do with the distribution of the moneys. When the court has the money, it belongs to the creditors of the Defendant. We are now doing away with the report of distribution without the presence of the Defendant, though his estate is diminished so much. Vide 5 Proudhon, *Usufruit*, n° 2236.

JUDGMENT IN APPEAL : 1° considérant qu'en l'année 1853, l'Appelant s'est rendu adjudicataire, à un décret forcé poursuivi par l'Intimée sur John Donegani, d'un certain fief situé à l'extrémité ouest de l'île Perrot, district de Montréal, et désigné dans les annonces du shérif comme suit, savoir : " une terre en fief, relevant à foi et hommage, située à l'extrémité ouest de l'île Perrot, sur le côté opposé à Vaudreuil, contenant quatre cents arpents, c'est-à-dire, tout ce qui peut se trouver dans les limites suivantes, à partir de la ligne de Jean Moreau au sud-ouest, suivant le biais de la rivière, séparant la dite île Perrot de l'île de Montréal, et s'étendant vers le nord-est au terrain des représentants Janisse ; de là allant dans une direction sud-est, le long de la ligne des dits représentants Janisse, jusqu'à l'intersection de la dite ligne avec celle de Joseph Lalonde ; " que la dite adjudication a été faite pour le prix de £1100 courant, que l'Appelant a payé et déposé entre les mains du dit shérif, et qui, sur jugement de distribution, a été, le 26 juin 1854, payé à l'Intimée créancière du dit Donegani ; 2° considérant que le dit fief, au lieu de contenir quatre cents arpents n'en contenait, lors de la saisie et de la dite adjudication d'icelui, que cent quatre-vingt huit tout au plus ; qu'ainsi induit en erreur quant à la contenance, l'Appelant a été porté à enchérir jusqu'à la somme de £1100 dit cours et qu'en payant cette somme, l'Appelant se trouve avoir payé de trop, indûment et sans cause, une somme de £583 dit cours, dont l'Intimée a profité et dont partant il a le droit de lui demander le remboursement avec l'intérêt sur icelle, à compter du 26 juin 1854 ; 3° considérant que, par conséquent, il y en a mal jugé dans le jugement dont est appel, en ce qu'il a débouté l'Appelant de son action ; 4° considérant, de plus, que le 18 octobre 1858, Damase Douaire Bondy, avocat, est intervenu dans l'instance alors pendante entre les parties en la Cour Supérieure, concluant, par sa requête en intervention, à ce que la dite somme de £583 dit cours, réclamée en cette cause par le dit F. Desjardins, l'Appelant, lui fut payée, vu que cette dite somme lui avait été cédée et transportée par le dit Desjardins, par acte du 5 décembre 1857, passé devant Labadie et son confrère, notaires, le dit transport duement signifié à l'Intimée le 7e jour du dit mois de décembre : que les parties demanderesse et défenderesse à cette action ont déclaré qu'ils ne contestaient pas la dite intervention, et ont demandé acte de cette déclaration ; que, par conséquent, il y a lieu de faire droit sur les conclusions de la dite requête en intervention ; infirme le susdit jugement dont est appel, savoir le jugement rendu le 31 décembre 1858 par la Cour Supérieure, siégeant à Montréal, avec dépens, sur le présent appel, contre l'Intimée, au profit du dit Appelant, et cette cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû ren-

dre, déclare Bondy recevable dans son intervention, et joignant le fond de la dite intervention à l'instance principale, pour être statué ensemble sur le tout, condamne la Défenderesse Intimée à payer au dit Damase Douaire Bondy, pour les causes énoncées dans la déclaration et la requête en intervention, la susdite somme de £583 dit cours, avec l'intérêt légal sur icelle à compter du dit jour, 26 juin 1853, laquelle dite somme Desjardins avait, par les susdites causes, le droit de répéter de la Défenderesse Intimée. AYLWIN and DUVAL, Justices, dissenting. (8 *J.*, p. 106, et 10 *D. T. B. C.*, p. 325.)

R. and G. LAFLAMME, for Appellant.

CHERRIER, DORION and DORION, for Respondent.

COURS D'EAU.—CHAUSSEE.

COUR SUPÉRIEURE, Québec, 1er février 1859.

Présent : CHABOT, Juge.

JOLY, Demandeur, *vs.* GAGNON, Défendeur.

Jugé : Qu'un propriétaire n'a pas le droit, sous les dispositions de la 19e et 20e Vict., ch. 104, d'ériger sur un cours d'eau, une chaussée aboutissant sur la terre du propriétaire vis-à-vis ; et qu'une chaussée ainsi érigée, sera démolie à la demande de ce dernier. (1)

Le Demandeur, par son action, se plaignait qu'étant propriétaire d'un terrain borné d'un côté par la rivière Boisclair et par la terre du Défendeur, le Défendeur avait construit une chaussée d'un bord à l'autre de la rivière, et s'était emparé du terrain du Demandeur et y avait fait des excavations considérables pour y construire une des ailes de sa chaussée, en raison de quoi, le Demandeur avait souffert des dommages, en autant que la rivière Boisclair étant peu profonde, la chaussée formait un obstacle à la sortie des bois de commerce du Demandeur qui descendait par la rivière ; la déclaration après avoir récité un protêt fait par le Demandeur contre le Défendeur concluait à des dommages pour la somme de £350, et en outre, à ce qu'il fût condamné à démolir, sous tel délai qu'il plairait à la cour ordonner, toute la partie de la dite chaussée qui se trouvait sur le terrain du Demandeur, et à disposer et arranger le reste de la chaussée de manière à ce qu'à l'avenir, les billots et bois de commerce du Demandeur ne courraient plus risque d'être arrêtés dans leur descente.

Le Défendeur plaida que la chaussée était construite suivant les règles de l'art et qu'il y avait une ouverture et glis-

(1) V. art. 5535 et 5536. S. R. Q.

soire, ou *slide*, suffisante, pour permettre aux bois de commerce de passer et, que par la loi, tout propriétaire avait droit de construire des écluses, chaussées, et autres travaux semblables pour utiliser et exploiter tout cours d'eau qui borde, longe ou traverse sa propriété ; et que le Défendeur n'avait fait qu'user de son droit en construisant une chaussée ou écluse sur la rivière, et des moulins sur un lot de terre avoisinant, et qui bordait la rivière, lequel lot de terre, était lors des constructions, tenu à bail emphytéotique par le Défendeur qui l'avait acquis à ce titre du propriétaire ; et de plus, le Défendeur plaida que le Demandeur ne pouvait, quant à présent, maintenir son action parce qu'il avait cumulé dans sa demande deux actions distinctes et séparées qui ne pouvaient être jointes dans une même demande ; que le Demandeur poursuivait le Défendeur au possessoire, alléguant qu'il s'était illégalement emparé et mis en possession d'un morceau de terre appartenant à lui, Demandeur, et y avait construit une chaussée ; et concluait à ce que le Défendeur fût condamné à démolir la partie de la chaussée qui se trouvait sur le dit morceau de terre, et que, par la même action, il poursuivait pour dommages résultant au Demandeur de ce qu'une chaussée construite sur la rivière Boisclair, par le Défendeur, avait, par des vices de construction, retenu le bois que le Demandeur faisait descendre le printemps, dans la rivière, et lui avait causé les dommages qu'il réclamait. Le Défendeur appuyait ses prétentions sur les provisions de l'acte 19e et 20e Vict., chap. 104. Il fut prétendu, de la part du Demandeur, que le statut cité n'avait aucune application à la cause, et ne donnait pas le droit à un propriétaire de s'emparer de la propriété de son voisin, pour construire une chaussée, mais, seulement d'exploiter tout cours d'eau qui borde ou traverse sa propriété en construisant des chaussées, ponts ou autres choses, de telle manière qu'ils ne nuiraient pas aux autres propriétaires ; et que, si le statut en question avait aucune application à la chaussée construite par le Défendeur, il irait à établir l'action du Demandeur pour le dommage qu'il en avait souffert, et lui donnerait le droit de faire démolir la chaussée, suivant les conclusions de sa déclaration.

PER CURIAM : L'action du Demandeur est bien fondée, et il n'y a pas de doute que, sous les provisions du statut qui a été cité, le Défendeur n'avait pas le droit de s'emparer de la propriété du Demandeur, de l'autre côté de la rivière, pour la construction de la chaussée. Le statut en question donne le droit aux propriétaires riverains de construire des ponts, chaussées, etc., de telle manière, seulement, à ce qu'ils ne nuiront point aux autres propriétaires ; et il pourvoit expressément à ce que, si, par telle érection, aucun dommage est causé aux autres proprié-

taires, celui qui a construit les ponts, chaussées, etc., sera responsable pour les dommages ainsi soufferts ; et qu'à défaut de paiement de tels dommages, il sera tenu de démolir les travaux qu'il aura ainsi construits. Quant au reste, la conclusion du Demandeur pour dommage est déboutée faute de preuve.

" La cour considérant que le Défendeur est entré sur le terrain décrit en la déclaration du Demandeur et y a fait ériger partie d'une chaussée sans droits quelconques, condamne le Défendeur à démolir, avant le premier juin prochain, toute la partie de la dite chaussée par lui construite et érigée sur le terrain du Demandeur, et à défaut de ce faire par le Défendeur dans le dit délai, et icelui expiré, la cour permet de faire la démolition aux frais et dépens du Défendeur. Et la cour déboute le Demandeur du reste de la demande, faute de preuve, sauf son recours comme il avisera." (9 *D. T. B. C.*, p. 166.)

JOLY, pour le Demandeur.

TESSIER, Conseil.

CASAULT et LANGLOIS, pour le Défendeur.

VOITURIER.—RESPONSABILITE.

SUPERIOR COURT, Quebec, 18 December, 1858.

Before MEREDITH, Justice.

CADWALLADER *vs* THE GRAND TRUNK RAILWAY CO.

Jugé : Que les voituriers sont responsables pour les somme d'argent pour dépenses de voyage, jusqu'à un montant raisonnable, et tel qu'une personne prudente jugerait à propos de déposer dans sa malle de voyage.

2° Que les commissionnaires seront déclarés responsables dans le cas d'un voyageur, maître de vaisseau, pour une boite à toilette et pour une longue-vue ou télescope, sur la présomption qu'il peut avoir cru que ces effets lui seraient utiles pendant le cours de son voyage sur l'Atlantique.

3° Que le serment d'un voyageur sera reçu pour constater la valeur du contenu d'une malle qui a été perdue, par la raison qu'il est probable qu'il n'y a que lui qui en connaisse le contenu.

4° Que les commissionnaires ne sont pas responsables pour des effets de joaillerie, attendu que ces effets ne peuvent être considérés comme faisant partie du bagage d'un homme (1).

The Plaintiff, a passenger from England, on arriving at Portland, placed his luggage in charge of Defendants, for conveyance to Pointe Levy, for which he received checks. The Plaintiff was a passenger on the cars himself, and, instead of going straight through to Pointe Levy, diverged at some point on the road, and went to Montreal, where he remained a few days, and then went to Pointe Levy. On application to De-

(1) V. art. 1677 C. C.

fendants, at the latter place, he found that one of his checked trunks was lost, and it was for the value of this lost trunk and its contents, that the action was brought. The Defendants, without admitting their liability for any of the articles claimed contended that, under any circumstance, they could not be held liable for the following articles claimed by Plaintiff, namely: a pair of night glasses for sea use, of the value of £12. 10. 0. sterling; two rings of the value of £13. 0. 0. sterling; a dressing case of the value of £7. 0. 0. sterling; and twenty-seven sovereigns, which Plaintiff alleged he carried with him for travelling purposes and personal use.

HOLT, for Plaintiff, argued that Defendants were liable for the effects enumerated, inasmuch as every traveller must be supposed to have a reasonable amount of money with him for travelling expenses; and that the most convenient and usual mode of carrying any small sum other than what was required for immediate use, was to place it in a trunk, and this being the general custom of travellers, Defendants must be presumed to know it, and were, therefore, liable for all such sums as travellers might reasonably be supposed to carry for travelling expenses and personal use, and that, in such cases, Plaintiff's own evidence was proof as to the contents of the lost trunk and of the value of the effects therein. That the delivery of the trunk in question to Defendants was fully proved by the production of the "check" by Plaintiff, apart from any further evidence (1).

ANGERS, for Defendants, contended that the action could not be maintained at all; that it was founded on a special contract to convey or carry from Portland to Pointe Levy; the Plaintiff then, instead of going straight on to Pointe Levy, went to Montreal, remained there two or three days, then came to Quebec, and four or five days after demanded his trunks; that Defendants had, therefore, performed their contract by bringing the alleged missing trunk to Pointe Levy, which it was proved they had done, and that, consequently, from that moment their responsibilities as carriers had ceased, and they became mere warehousemen, *volontaires ou sans gages* or *dépositaires gratuits;* and that, therefore, Plaintiff not having proved negligence, the law, under the circumstances, would not presume negligence, and the action must therefore be dismissed. (Meredith, Justice: Is it necessary to prove negligence, to charge you with failure as carriers to deliver?) No, but Defendants were not liable as carriers beyond a reasonable time, and, if such reasonable time were

(1) Pierre, on American Railroad Law, p. 500; Angel on Highways, sec. 385; Angell on Carriers, secs. 476, 478 and 479.

allowed to elapse, then negligence must be proved (1). That, with respect to wearing apparel, Plaintiff himself could prove the value, but that, with regard to jewelry or money, his evidence on oath was not admissible and could not be received as proof, and that, even if proved by other evidence, Plaintiff could not recover for it, that the French law obtained in this county with respect to the question, and the whole subject would be found fully and ably discussed in " Rebel, *Traité de la législation des chemins de fer*, n° 511," where a number of authorities would be found collected and commented upon ; and that it would be found there laid down, that a passenger or traveller could not recover for jewels and money, either under the old or according to the new law of France, unless the parties sought to be held liable, were notified that the trunk contained such jewels and money (2).

HOLT, in reply, disputed the doctrine that Defendants' duty was at an end as carriers when they brought the trunk to Quebec, and, besides, it was for them to shew that they had brought it to Quebec, which they had not done. That, with respect to the case, reference should not be had exclusively to French authorities, because railway losses were of recent occurrence, and, therefore, American and English authorities ought to be referred to; and, even in the authority cited by Defendants, Rebel, it would be found laid down at page 288, that a reasonable sum for presumptive expenses of the voyage would be allowed.

MEREDITH, Justice: The point in the case which has presented the most difficulty to my mind is as to whether a reasonable sum of money, carried *bonâ fide* for travelling purposes, can be considered as part of the luggage of a traveller, so as to fasten a liability upon a common carrier. The opinions of Toullier and Duvergier have been cited by the learned counsel for Defendants as being in their favor, and, to some extent, they certainly are so. Those authors, in effect, put the following question : " Mais (les voituriers) sont-ils " tenus de restituer le montant des sommes d'argent, ou la " valeur des bijoux que les expéditeurs auraient placés dans " leurs malles, sans les déclarer autrement que sous le nom " générique d'effets ?" And they both answer the question in the negative, and cite, as supporting their views, an *arrêt* of the Cour de Bruxelles, of the 28 April, 1810; an *arrêt* of the Cour de Paris, of the 2nd April, 1811 ; the opinion of Lamoi-

(1) Angell on Carriers, sec. 114, and notes 1 and 2, and sec. 115 and note 3 ; Ib., secs. 475, 476, 477, 478 and 481 ; also secs. 303, 304, 317, 318 and 320.

(2) 19 Duvergier, *Contrat de louage*, n° 329 ; 11 Toullier, *Contrat de louage*, n° 255 ; Lacombe, *vbo* Coche ; Répertoire, *vbo* Messager; 1 vol. American Railway Cases, pp. 405 to 410.

gnon with respect to the liability of hotel-keepers (which I have not been able to find), and a passage in the Nouveau Denisart, under the word *Aubergiste*. And the learned Counsel for Defendants has also cited Rousseau de La Combe, verbo *Coche*, and Guyot's Répertoire, verbo *Messager*, as showing what the law in France formerly was on this subject. The authorities above cited clearly establish that, as a general rule, common carriers cannot be made liable for money or jewelry as part of the luggage of a traveller; but they do not discuss the question as to whether a small sum, intended merely for travelling expenses, may not be considered part of a travellers' luggage; and, therefore, be treated as an exception to the general rule which they lay down. The *arrêt* of the 5th January, 1627, of which a note is given by Rousseau de La Combe, under the word *Coche*, and which is referred to by all the subsequent writers, was rendered against a hotel-keeper; and, so far as I can see, from the notes given, decided, in general terms merely, that hotel-keepers, " ne sont pas tenus de la perte de l'argent, s'ils n'en sont chargés par leurs registres." The passage in the Nouveau Denisart, referred to by Toullier and Duvergier, is as follows: " on n'est pas libre " d'ailleurs de rendre des aubergistes responsables de sommes " indéfinies, en supposant dans des malles des effets précieux, " tels que des diamants et des bijoux, qui ne seraient pas pré- " sumés y être. En pareil cas, il faut dénoncer à l'aubergiste " qu'on est porteur d'effets précieux dont on le charge nom- " mément. Hors ces cas particuliers, la seule déclaration des " plaignants, pourvu que, d'ailleurs, ils jouissent d'une répu- " tation saine et entière, suffit pour faire condamner l'auber- " giste à la restitution des effets que ceux-ci articulent avoir " perdus." An authority to the same effect will be found in Guyot's Répertoire, verbo *Messager*, 11 vol., p. 488. " Avant " 1681, on faisait difficulté lorsque des effets se trouvaient " perdus par la faute ou la négligence d'un maître de messa- " geries, ou de ses facteurs, de le condamner à rendre la valeur " au propriétaire, sur la déclaration détaillée que celui-ci en " donnait, et qu'il affirmait véritable." On the 18th June, 1681, however, the officers of the Chatelet de Paris, made a regulation (the validity of which was frequently disputed) limiting the liability of common carriers, in relation to valises, trunks, and other packages, under lock and key (1); and an *arrêt du Conseil*, of the 7th August, 1775 (2), seems to have had the effect of reviving the regulation to which I have just alluded; but, as neither the regulation of 1681, nor the *arrêt*

(1) Guyot, *Rép.*, vol. 11, p. 488.

(2) Guyot, *Rép.*, vol. 11, p. 489.

reviving it have force of law here, it is needless to dwell upon them; and I refer to them merely for the purpose of showing that any judgments rendered under their influence cannot be of authority with us. Passing from the old law of France to the modern *arrêts* cited by Toullier and Duvergier, I would observe that the *arrêt* of the Cour de Bruxelles, already referred to, and bearing date the 18th April, 1810, was rendered with respect to a sum of money which could not have been intended merely for immediate travelling expenses; namely a sum of 4,000 francs. As to the *arrêt* of the Cour de Paris, of the 2nd April, 1811, also referred to by Toullier, he does not give the value of the jewels and money alleged in that case to have been lost; nor is the value given in the report of the case by Sirey (which I have examined), but I see nothing to lead to the belief that the money lost was intended for travelling expenses. Bosquet, in his *Dictionnaire de droit*, under the word *Voiturier*, after referring to the opinion of Duvergier, says: " Mais je ne partage pas cette " dernière opinion; car décider en principe que les entrepre- " neurs de voitures ne sont pas responsables de l'argent non " déclaré, ce serait diminuer les obligations auxquelles ces en- " trepreneurs sont tenus, et créer une exception qui n'est pas " dans la loi. C'est au reste aux magistrats à apprécier les cir- " constances où ils peuvent admettre ou rejeter la demande du " voyageur, suivant qu'elle leur paraît bien ou mal fondée." Troplong expresses a very decided opinion upon the particular point now under consideration; and, so far as I know, he is the only French author who makes the distinction between money carried for transportation, or for any such purpose. He says: " Les entrepreneurs doivent savoir que les malles des " voyageurs contiennent ordinairement de petites sommes " sommes d'argent, par exemple de 500 ou 1000 francs, plus " ou moins, nécessaires aux besoins du voyage, et aux pre- " mières dépenses d'arrivée, c'est ce qui se pratique habituel- " lement et très légitimement; et ils doivent mesurer sur cet " usage leur vigilance et leur précaution. (1)" He then refers to the opinion of Toullier, and to the passage in the Nouveau Denisart, already referred to, and continues thus: " Ici, il ne " s'agit plus de sommes indéfinies; le juge n'admet l'affirmation " que dans la mesure raisonnable que j'indiquais à l'instant, et, " d'après les règles d'équité données par l'article 1369, *c'est un* " *point que le système que je combats perd sans cesse de vue.* " Il ne s'agit pas non plus d'objets qui ne soient pas présumés " être dans les malles; car, la présomption est au contraire " qu'ils y sont." In support of this view, the learned author

(1) Troplong, *Louage*, nº 950, 11 vol., p. 175.

cites an *arrêt* of the Cour de Montpellier which condemned a common carrier to pay to a traveller in addition to the value of the wearing apparel in his trunk, a sum of 800 francs, which he had placed there.

An appeal from the judgment was rejected, on the 10th April, 1828, by the Court of Cassation (Henrion de Pansey, then being president of that court), by an *arrêt* worded as follows : " Attendu que l'arrêt de la Cour de Montpellier est " motivé plutôt en fait qu'en droit ; qu'il ne juge pas d'une " manière absolue que les entrepreneurs de voitures publiques " sont responsables indéfiniment de l'argent contenu dans les " malles ou valises, et non formellement déclaré par les voya- " geurs ; que sa décision est principalement basée sur ce qu'il " résultait des faits et circonstances particulières de la cause " que l'affirmation du voyageur était conforme à la vérité, et " que, de cette appréciation de circonstances, il ne peut sortir " aucune violation des lois, rejette, etc. " By an *arrêt* of the Cour royale d'Alger, of the 16th December, 1846, that Court held : " En cas de perte d'objets non enregistrés, et que des " voyageurs réclament, comme les ayant apportés avec eux, " telle qu'une malle, la valeur de cette malle doit être estimée " alors même qu'elle serait déclarée contenir des effets et de " l'argent, d'après des présomptions abandonnées à l'apprécia- " tion des juges. " (1) The sum allowed in this case was 1350 francs ; but it is proper to observe there was evidence that the traveller had received the money in question at the commencement of her journey. The authors of the collection cited from, in notes 3 and 4 to the foregoing case, refer, I may say, to all the foregoing authorities ; and, after giving the passages from Troplong, above cited, add : " La même doctrine est partagée " par MM. Currasson, *Compét. des juges de paix*, t. 2, p. 303, " n° 29 ; Venhappel, *au contrat de louage*, pp. 13, 31 ; et cette " dernière opinion, déjà consacrée *par les décisions citées en* " *commençant*, a été admise par le présent arrêt. "

On the 17th March, 1847, the Cour royale de Douai rejected the claim of a traveller for 1100 francs, money contained in a trunk lost by a Railroad Company, on the ground that the money was in the trunk for transportation, and not for personal use, one of the *considérants* of the *arrêt* is as follows : " Que ces principes peuvent d'autant moins souffrir de difficultés dans la cause, qu'il ne s'agit pas d'une somme modique qui aurait été placée par Dupeu, dans sa malle, pour subvenir aux frais de sa route, et qui pourrait à ce titre être *considérée comme l'accessoire de son voyage*, mais d'une somme de 1100 francs qui serait, de son propre aveu, le produit de diverses

(1) Dalloz, *Jur. fr.*, 1847, 2 part, p. 1.

recettes qu'il aurait faites dans une tournée commerciale ; et qu'il aurait voulu transporter de Lille à Arras." (1) The Tribunal civil de la Seine, by a judgment bearing date the 15th January, 1851, not only adopted, but went beyond the opinion of Troplong, already cited, and the last mentioned judgment was confirmed by the Court of Appeals on the 12th January, 1852, Mr. Troplong being himself first president of the court at that time. Having thus noticed, as succinctly as I could, the leading French authorities on this subject, within my reach ; and there being, so far as I am aware, no English decision as to the particular point now under notice, (2) I will briefly advert to the American cases to which my attention was drawn by the learned counsel who argued this case, almost all of these cases which I have had it in my power to examine are, I find correctly noticed in Mr. Angell's work, published last year, on the law of highways ; and I will therefore read his analysis, as I may call it, of these cases. Mr. Angell says (3) " So carriers are not liable for large sum of money, as baggage, " taken for the purpose of transportation. In the case of the " *Orange County Bank* vs. *Brown*, (4) it was held that the " owner of a steamboat used for carrying passengers was not " liable for a trunk containing a large sum of money, brought on " board by a passenger as baggage, the object being the trans- " portation of money. In *Weed* vs. *Saratoga and Schenectady* " *Railroad Co.*, (5) it was held that a railroad company was " liable for money in a trunk, to a reasonable amount for " travelling expenses, as baggage. In that case the sum was " $285, in the trunk of a passenger, from Saratoga to New- " York. In the case of the *Orange County Bank* vs. *Brown*, " above cited, it was supposed, although not expressly ad- " judged, that money for travelling expenses might be carried " as baggage at the risk of the carrier. But in the case of *Hand-* " *kins* vs. *Hoffman*, a doubt was expressed whether any " money could be considered as baggage." In a note the author refers, however to the case of *Bomer* vs. *Maxwell*, Tenn.

(1) Dalloz, *Jur. gén.*, 1852, 2 part, p. 294, see also an important *arrêt*, same work, vol. 1846, 1 part, sec. 192.

(2) This is probably owing to the provisions of the 11th Geo. IV, and 1 Wm. IV, cap. 68. " An act for the more efficient protection of mail contractors, " stage coach proprietors, and other common carriers for hire, against the loss " of, or injury to, parcels or packages delivered to them for conveyance or " custody, the value and contents of which shall not be declared to them by " the owners thereof. " This act, with a great number of cases in relation to it, will be found in *Chitty and Holmes' Statutes*, vol. 1, p. 92, *vbo* Carriers.

(3) Angell on Highways, No 381, p. 375.

(4) 9 Wendell (N. Y.) R., 85.

(5) 19 Wendell, (N. Y.) R., 534.

R., 621), in which the word baggage was held to include only such articles as are necessary for the personal convenience of the traveller, and not to embrace money, in that case $160. The number of Angell's work, of which I have already given a part, concludes as follows: " Upon consideration of the whole " subject and referring to the cases, the court have come to " the conclusion that money, *bonâ fide* taken for travelling " expenses and personal use, may properly be regarded as " forming part of a traveller's baggage." Mr. Pierce, in his work on american railway law, published in 1857, refers to all the foregoing american cases, and to some others, and gives his view of the law on the subject as follows. " Money, " *bonâ fide* taken for travelling expenses and personal use, to " such a reasonable amount as a prudent person would deem " necessary and proper, may be placed in the traveller's trunk, " for which the Company will be responsible as a common " carrier; but it will not be responsible as such for money so " carried, when intended for trade, investment or transporta- " tion." Chief Justice Redfield (of the State of Vermont), in his valuable treatise on the law of railways (edition of 1858), says: " But railways as carriers of passengers are not liable " for money which passengers may carry as baggage beyond " a reasonable sum for travelling expenses. The passenger is " allowed to take, not only money sufficient to defray the ordi- " nary expenses of the journey contemplated, but any reason- " able sum, in addition, for such contingencies as are not im- " probable." This rule of law, on this subject, as above laid down by Angell, Pierce, and Chief-Justice Redfield, seems to me to be reasonable and just, and in accordance with the principles of our own law; and, after giving to the conflicting authorities to which I have adverted, the best consideration in my power, I have come to the conclusion to act upon it in the present instance, in so far as regards the money claimed by the Plaintiff, which I think cannot be deemed an unreasonable sum, considering that the Plaintiff had just arrived from and was about to return to England. In connection with this branch of the case, I will merely add that on this continent where the travelling community, except in large cities, have not the protection of a police force, it might be dangerous to hold, as a general rule, that travellers should carry on their persons all the money intended for their travelling expenses, such a rule might, I apprehend, lead not only to thefts from the person, but to robberies.

The other articles, the value of which is claimed by Plaintiff, I will endeavour to dispose of in a few words. I allow the dressing case as an article which may form part of the baggage of any person in the same rank of life as the Plaintiff;

I allow the night glasses or telescopes for sea use, because the Plaintiff, as a ship-master, may reasonably have thought they might be useful to him in the course of his passage, across the Atlantic. The claim for £13, value of the two rings, I disallow. I do not think jewelry ought to be regarded, and I do not find any case in which it has been regarded, as part of a man's baggage. (1) The liability of common carriers, as all the authors admit, has already been carried very far; and to extend it as regards jewelry, would encourage fraud. It is easy to say what sum may be considered to have been reasonably set apart for the expenses incident to a journey, but it might be very difficult to limit a claim for jewelry. The question as to the liability of the Company, as was justly observed by the learned counsel for Defendants, is quite distinct from the question as to the proof to be adduced by Plaintiff, but it is to be recollected that the ground, and the only ground, upon which Defendants can be held liable for the money and articles above enumerated, is that they formed part of Plaintiff's baggage ; (2) and they ought to be regarded in that light, then there is exactly the same reason for receiving Plaintiff's oath as to them, that there is for receiving his oath as to any other part of the contents of the missing trunk. The general rule in the United States, appears to be " that after the passenger has proved the delivery of his trunk " to the Company, and the non-delivery by it, he is a competent " witness to prove its contents and value."(3) And this evidence is held admissible on the ground of necessity, as, in most cases, no one but the passenger is likely to be acquainted with its contents. The authorities already cited from Guyot's *Répertoire*, and the *Nouveau Denisart*, shew that the rule of the american law is in accordance with our own law on this subjet ; and, as in this case the loss by Defendants of Plain-

(1) In *McGillis* vs. *Rowan*, 3 Barr., Penn. R. 451, and in *Brookees* vs. *Pickwick*, 4 Bing. Rep., 218, the jewelry allowed (and I think properly allowed) belonged to ladies : 2 American Railway Cases, p. 366.

(2) The *arrêt* of the 17th March, 1847, speaks of a small sum (somme modique) set apart by a traveller for his personal use, as *l'accessoire de son bagage*.

(3) Pierce, on *american railway law*, p. 301 : In South Carolina, the Plaintiff cannot be examined, but, in the absence of proof, as to the contents of a trunk lost, and their value, the jury may give damages proportioned to the value of the articles which they in their judgment think the trunk fairly contain : Angell on Highways, No 385, and cases there cited : In *Butler* vs. *Basing*, 2 Car. and P., 613, Garrow, B. charged the jury as follows : " It " very often happens that persons pack their own cloths ; and in such cases, " it must be impossible to give evidence of the precise contents of their boxes " or portemanteaus. I should, therefore, recommend you, if you find for the " Plaintiff, to give damages proportioned to the value of the articles which " you, in your judgment, think the box might and did fairly contain."

tiff's trunk is proved beyond doubt, I am of opinion Plaintiff has a right to be heard upon the *serment supplétoire* as to the contents of his trunk and their value. (9 *D. T. B. C.*, p. 169.)

HOLT and IRVINE, for Plaintiff.

LELIÈVRE and ANGERS, for Defendants.

HYPOTHEQUE.—PREFERENCE.

SUPERIOR COURT, Quebec, 17th February, 1859.

Before Meredith, Justice.

SYMES, Plaintiff, *vs.* MCDONALD, Defendant, *and* ROBERTSON, Opposant, *and* SYMES, Opposant.

Jugé: Qu'une personne qui consent à ce qu'un immeuble qui lui est déjà hypothéqué soit hypothéqué en faveur d'un autre, sera censée avoir consenti à céder son rang d'hypothèque en faveur du créancier hypothécaire subséquent.

The Defendant sold to Peter Smith certain real estate, in consideration of the sum of £1700 ; which sale was registered. Some months subsequently, Defendant and Smith, entered into a notarial obligation in favor of Symes, by which they acknowledged to owe him £10,000, and jointly and severally promised to pay that sum with interest in ten years; and for the due payment of this sum and interest, Defendant and Smith, acting jointly, hypothecated the real estate acquired by Smith from Defendant as above mentioned, and upon which Defendant held a *bailleur de fonds* claim for the amount of the purchased money, £1700. This deed of obligation was registered. The Defendant, afterwards, transferred his *bailleur de fonds* claim to Robertson, and the real estate so sold by Defendant to Smith, and hypothecated by them both to Symes, was brought to sale in the case. Robertson then filed an opposition for the *bailleur de fonds* claim so transferred to him, and Symes filed an opposition claiming the £10,000 for which the real estate in question was hypothecated to him by Defendant and Smith. Symes also contested the opposition of Robertson as representing McDonald, on the ground that McDonald, by consenting to the mortgage in favor of Symes, in effect waived his prior *bailleur de fonds* claim, in so far at least as he Symes was concerned, and that he Robertson could exercise no further or greater right by the transfer than McDonald himself possessed.

STUART, A., for Robertson, contended that the mere presence of McDonald, at the time of the passing of the deed giving the

mortgage to Symes, was not of itself sufficient to cause his mortgage to be postponed in favor of that of Symes; that the mere presence of an hypothecary creditor, whether as a witness, or otherwise, at the granting of a subsequent mortgage was not sufficient of itself to operate as a renouncement of his claim in favor of such subsequent mortgage. (MEREDITH, Justice: In other words, does the fact of McDonald being a party to the deed granting such subsequent mortgage, operate as a postponement of his prior mortgage?) It is pretended that, in no case, can the presence of an hypothecary creditor operate as a postponement of his mortgage, except such preference is expressly given by the deed granting such subsequent mortgage, unless founded upon the supposed fraud of the creditor in concealing or keeping silent as to the existence of his prior mortgage; (1) now, in this case, no such charge can be preferred against McDonald, for not only was his mortgage registered before the granting of the subsequent mortgage to Symes, but allusion is made to his *hypothèque* in the very deed giving a mortgage to Symes, and, therefore, Symes must be presumed to have been aware of McDonald's prior mortgage, and if he was desirous of having a preference over it, he ought to have had such preference stipulated and expressed in the deed, not having done so, he must be presumed to have relied upon such subsequent mortgage without preference over McDonald's claim. And it would be a manifest injustice to Robertson, who was the *bonâ fide* holder of the assignment, to grant a preference to Symes, as he could say to Symes, you were aware of McDonald's prior mortgage at the time the deed was passed, and you did not think proper to stipulate that you should have a preference over it, and, by your omissions to do so, I was induced to pay away my money and accept an assignment from McDonald of his prior claim, and now you want to deprive me of my rights, and to obtain a preference over my prior claim so assigned to me by McDonald; Symes, if he were desirous of obtaining a preference over McDonald's claim, ought to have had such preference stipulated in the deed, and not having thought proper to do so, he must abide by the consequences.

BOSSÉ, for Symes, maintained that the principle of law was perfectly clear upon the point, that an hypothecary creditor who became, as McDonald had in the case, a party to a deed granting a subsequent mortgage in favor of a third party, must

(1) 9 Nouveau Denisart, vbo *Hypothèque*; 8 Guyot, Rép., vbo *Hypothèque*; 3 Domat, tit. 1, p. 365; 2 Tubeau, *Droit consulaire*, liv. 2, tit. 12, cap. 3, p. 365; 4 Troplong, *Privilèges et Hypothèques*, p. 34, n° 869; 2 Grenier, *Hypothèques*, p. 453, n° 508; Ricard, *Donations*, art. 1, cap. 4, n° 1250; Pothier, *Hypothèque*, cap. 3, p. 65; 9 Ancien Dalloz, vbo *Hypothèque et Privilège*, cap. 2, s. 9, n° 4, page 421.

thereby, be presumed to give a preference to such subsequent mortgage and to give it priority over his own claim, and that if he wishes to avoid this, and to preserve the priority of his own mortgage, he must expressly stipulate for its preservation by a special clause in the deed granting such subsequent mortgage to which he is a party : (1) and that McDonald not having done so he must be considered as having given a preference to Symes' claim, and besides that he had in and by the deed giving the hypothec to Symes, agreed and undertaken to *faire valoir* in favor of Symes ; and that Robertson, by the assignment, could acquire no greater right from McDonald than McDonald himself possessed, and, therefore, the contestation must be maintained.

MEREDITH, Justice: This case has been heard upon the opposition of Alexander Robertson, as the assignee of Angus McDonald, and that opposition has been contested by George B. Symes, also an Opposant. The question for the consideration of the court is, as to whether the prior *bailleur de fonds* claim of Angus McDonald, is to be postponed to the subsequent hypothecary claim of Symes, in consequence of the cooperation, on the part of McDonald, in the creation of the mortgage in favor of Symes. Angus McDonald, by deed of sale bearing date the 27th day of April, 1853, sold to Peter Smith certain real estate in consideration of £1700 and this deed of sale was duly registered on the 20th of May of the same year. Some months afterwards, on the 15th day of November, 1853, Angus McDonald, and Peter Smith, entered into a notarial obligation in favor of George Burns Symes, by which they acknowledged to owe him £10,000, and jointly and severally promised to pay that sum, with interest, in ten yeas; and for the due payment of the last mentioned sum and interest, Angus McDonald and Peter Smith, acting jointly, hyothecated the real estate acquired by Smith from McDonald, by the deed of 27th April, 1853, already mentioned; and upon which, McDonald, under that deed, had a *bailleur de fonds* claim for £1700. This deed of obligation was afterwards, namely, on the 18th November, 1853, duly registered. Angus McDonald, afterwards, transferred the *bailleur de fonds* claim so due to him, to Alexander Robertson, the present Opposant; and the real estate sold by McDonald to Smith, and hypothecated by them both to George B. Symes has been brought to sale in the present cause.

Robertson has filed an opposition for this *bailleur de fonds* claim so transferred to him: Symes has also filed an oppo-

(1) 5 Proudhon, *De l'Usufruit*, nos 2172 à 2180 ; 20 Duranton, p. 504, nos 297 to 301 ; 2 Troplong, *Privilèges et Hypothèques*, édition belge, p. 338, n° 872, et notes, and authorities there referred to ; 2 Persil, *Régime hypothécaire*, p. 251 ; Lacombe, vbo *Hypothèque*, p. 340, s. 12 ; 1 Teulet et d'Auvilliers, p. 118.

sition claiming the £10,000, for which the real estate in question was hypothecated in his favor, by Smith and McDonald, by the deed of the 15th day of November, 1853 ; and Symes has contested the opposition of Robertson, as representing McDonald, on the ground that McDonald, by consenting to the mortgage in favor of Symes, in effect, waived his prior claim of *bailleur de fonds*, in so far, at least, as regards Symes.

At the time of the argument I was under the impression that, although the obligation in favor of Symes was a joint and several obligation on the part of Smith and McDonald. yet, that each of those persons had separately mortgaged his own real estate, but afterwards, on reference to the deed of obligation, I found it made more in favor of Symes than I supposed ; inasmuch as McDonald has acted jointly with Smith in hypothecating, in favor of Symes, the real estate upon which McDonald's *bailleur de fonds* claim rested. This seems to me to bring the present case within the rule that a person who consents to the hypothecation in favor of another, of real property already hypothecated in his own favor, is presumed to waive his priority of mortgage in favor of the creditor obtaining such subsequent mortgage. Numerous authorities were cited by the learned counsel for Robertson, tending to show that the mere presence of an hypothecary creditor, whether as a witness, or otherwise, at the granting of a subsequent mortgage would not, of itself, be sufficient to cause the mortgage of such creditor to be even postponed, unless there was some ground for charging the creditor, so sought to be postponed, with fraud or unfair concealment. But, in the present case, McDonald did not merely witness the granting of a mortgage to another, upon the premises already incumbered in his own favor ; he did more, for he acted jointly with Smith in creating the subsequent mortgage in favor of Symes, and jointly with Smith, received the consideration £10,000 ; thus, as it seems to me, in the most effectual manner consenting to the creation of Symes' subsequent mortgage. The authorities applicable to the present case, as viewed in the light just mentioned, seem to me to be clearly in favor of the pretention of Symes, and I shall content myself with citing two or three passages, as showing what was the old law of France on this subject, to which I shall add a few modern authorities. POTHIER, *Traité de l'hypothèque*, vol. 5, p. 468, says : " Le consentement que donne le créancier à " l'aliénation, ou même à l'obligation de la chose hypothéquée, " renferme une remise tacite de son droit d'hypothèque." The learned writer then explains the ground upon which an hypothecary creditor who consents to a sale is presumed to waive his right, and adds : " Il en est de même lorsque le créancier a

" consenti que le débiteur obligeât à un nouveau créancier la " chose hypothéquée, car le débiteur n'ayant pas besoin du " consentement du premier créancier pour constituer à son " nouveau créancier une hypothèque qui n'aurait lieu qu'après " la première, le consentement du premier créancier ne " peut guère paraître donné et requis à d'autre fin que pour " remettre son hypothèque." In the present case, Smith could have mortgaged his property in favor of Symes without the cooperation of McDonald, and I do not think I would be justified in supposing that cooperation was given without some object; and the only object the parties could have had in view in obtaining on the one hand, and on the other in giving the cooperation in question, was to render the mortgage in favor of Symes as effectual as it could be made by the joint acts of Smith and McDonald. It is to be observed also that Mrs. McDonald became a party to the obligation in favor of Symes for the purpose of barring her rights, and, if she was required to bar her rights, it is not to be presumed that the parties intended that McDonald should retain his privileged claim, so as, to the extent of that claim, to defeat the mortgage which he himself had assisted in creating in favor of Symes. But whatever may have been the intention of the parties it seems plain that McDonald, by acting jointly with Smith in granting the mortgage to Symes, effectually consented to the granting of that mortgage; (1) and according to the authorities, that, of itself, suffices to cause the second claim to be preferred to the first. In *Guyot's Rep.*, vol. 8, page 667, it is said: " Lorsque le premier créancier a consenti que le " débiteur obligeât la chose déjà hypothéquée à un second, on " ne présume pas qu'il ait voulu absolument remettre son " droit, mais seulement céder l'avantage de la priorité au nou- " veau créancier."(2) The modern authorities are equally clear; Troplong, *Priv. et Hyp.*, n° 871, says: " Le créancier qui con- " sent que la chose soit hypothéquée à un autre, est censé re- " noncer aussi à son hypothèque." Paulus respondit, Sempro- " nium antiquiorem creditorem consentientem, quùm debitor " eamdem rem tertio creditori obligaret, jus suum pignoris re- " mississe videri." L. 12 s. Quib. mod. pig. vel. hyp. solv. 2, Grenier, *Hyp.* n° 505, p. 451: " La renonciation à l'hypo- " thèque résulte, non seulement, comme nous l'avons vu, du

(1) See Troplong, *Priv. et Hyp.*, vol. 2, n° 683, p. 483.

(2) See also, Lacombe, *Recueil de Jurisp.* verbo *Hypothèque*, n°s 12 et 13, p. 340 and arrêts there cited. At n° 13 the author says: " Quoique le consen- " tement du créancier ne soit exprès, mais tacite, comme quand il souscrit, " sans protestation, l'acte par lequel son débiteur hypothèque ses biens à un " autre, il est privé de son hypothèque en deux cas." The second being: " Quand sans cette clause expresse certain corps ou fonds désigné est hypo- " théqué par cet acte et souscrit par le créancier, sans protestations."

" consentement donné par le créancier à la vente de la chose " qui lui est hypothéquée, mais elle s'induit encore du simple " consentement à ce que cette chose soit hypothéquée en " faveur d'une tierce personne. Cette décision n'offre aucune " difficulté ; elle est fondée sur les mêmes motifs que pour le " cas de la vente." (1)

These authorities seem to me to be only reasonable. A person who consents to the granting of a mortgage upon real estate, already encumbered in his own favor, virtually consents that the creditor obtaining such second mortgage shall be paid from the proceeds of the sale of the real estate so hypothecated in favor of such creditor ; and the person granting such consent ought not to be allowed to render it nugatory by urging his own prior claim to the prejudice of the subsequent mortgage created with his own consent. In the present instance the prior hypothecary creditor has even less reason to complain than in ordinary cases, as he himself not only aided in creating the second mortgage jointly with Smith, but, as already mentioned, received, with Smith, the consideration for which the second mortgage was given, namely £10,000. I had intended to have noticed some english and american cases bearing on this subject, but I shall not do so as I find that they are all distinguishable from the present case in this respect, that the present judgment rests on the formal consent of the first mortgagee to the creation of the second mortgage, whereas no such consent was given in any english or american case that I have seen. The cases to which I refer will be found collected in *Story's Eq. Jur.*, vol. 1, pp. 391, 392, 393. I do not fail to bear in mind that the learned counsel for the Opposant Robertson, relied much on the knowledge which Symes must be presumed to have had of McDonald's claim, in consequence of its having been duly registered, and also in consequence of the reference, in Symes' mortgage, to the sale of the 27th April, 1853, from McDonald to Smith. These considerations would doubtless be of importance if the claim to have McDonald's privilege as *bailleur de fonds* postponed, rested upon any charge of fraud or concealment against McDonald ; but, as in this case, the ground of postponing McDonald's *bailleur de fonds* claim, is his own consent to the granting of the subsequent mortgage, any knowlegde which Symes may be supposed to have had of the existence of McDonald's claim is, to say the least, comparatively unimportant. Indeed, it may not be unreasonably supposed that it was in order to provide against such claims

(1) See also Proudhon, *Usufruit*, vol. 4, n° 2173, more particularly the observations of the president Fabre quoted there : Persil, *Reg. hyp.*, vol. 2, p. 251 ; Com. de l'art. 2180, n° XXIII ; Duranton, vol. 20, p. 504, n°s 300 and 301, and particularly Battur, 4 vol., p. 389, n° 764.

that the mortgage in favor of Symes was prepared in the manner already mentioned. Another point contended for by the learned counsel for Robertson was, that although the participation by McDonald in the granting of the mortgage to Symes might possibly have been injurious to him had the demand for his *bailleurs de fonds* claim been made by himself, yet that Robertson, whose good faith has not been questioned, cannot be affected by the participation of McDonald in the creation of Symes' mortgage. I cannot, however, adopt that view ; if the consent given by McDonald had the effect of postponing his *bailleur du fonds* claim to Symes' mortgage, the relative position of the two claims could not be changed by the transfer of one of them to a third party. For these reasons, I am of opinion that the contestation of Symes must be maintained in so far as to enable Symes to be collocated in preference to the Opposant Robertson. (9 *D. T. B. C.*, p. 182.)

STUART and VANNOVOUS for Robertson.

BOSSÉ, J. N., for Symes.

RIVERS.—RIGHTS OF RIPARIAN PROPRIETORS.

PRIVY COUNCIL, 2nd December, 1858.

APPEAL FROM THE COURT OF QUEEN'S BENCH, for the Province of Lower Canada.

Present at the hearing on the 18th and 19th of June, 1858: The right Hon. DR. LUSHINGTON, the right Hon. T. PEMBERTON LEIGH, the right Hon. the Justice KNIGHT BRUCE, and the right Hon. the Lord Justice TURNER.

Present at the re-argument on the 2nd of December, 1858: The right Hon. Lord KINGSDOM, the right Hon. DR. LUSHINGTON, the right Hon. the Lord Justice BRUCE, the right Hon. the Lord Justice TURNER, and the right Hon. Sir JOHN TAYLOR COLERIDGE.

HARLOW MINER, Appellant, and FRANCIS GILMOUR, Respondent.

Rights of a riparian proprietor to use of water flowing past his land explained and defined.

Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes and for his cattle, and this, without regard to the effect which such use may have, in case of a dificiency, upon proprietor lower down the stream.

He has, also, the right to the use ot the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or

divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

Where a party purchased a piece of land with the right to use the water of a river in Lower Canada, subject to a preference in favor of a mill thereafter to be built, and which preference was to be exercised in a particular mode, such purchaser is not bound by its exercise in a different mode, and in favour of a different mill. The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion, from diverting the water by virtue of a right which existed prior to the first purchase.

There is no difference between the law of Lower Canada and the english law upon these points.

This was an appeal from the judgment of the Court of Queen's Bench of Lower Canada, which reversed a judgment of the Superior Court of Lower Canada, so far as regarded the right of the Appellant and Respondent to the use of the water in the Yamaska, otherwise Granby river, flowing by their respective lands on the banks of that river.

The Appellant was the owner of a plot of ground situate on the south bank of the Yamaska, and at the south end of a dam across the river he had erected a tannery. The Respondent was the owner of a plot of ground on the north side of that river, opposite the Appellant's land, he was also owner of a piece of land on the same side lower down the river, on which was erected a grist-mill worked by water power afforded by the river. A dam had been erected across the river from the land of the Appellant to the land of the Respondent, and in this dam there was a flume for the purpose of conveying the water held back by the dam to the Appellant's tannery. In the northern half of this dam there was a sluice, or gate, by opening which the water was drawn away from the dam and from the Appellant's tannery, and was sent down the channel of the river. The Respondent claimed the right to open the gate on the north side, over which he had control, and by which means the water was diverted from the Appellant's tannery. In consequence of the scarcity of water during periods of dry weather, and the Respondent keeping the sluice in his part of the dam open, to allow the water to flow down to his mill at the lower dam, the rest of the water at the upper dam was insufficient for the use of the Appellant's tannery. The Appellant deeming this injurious to his rights, commenced an action against the Respondent in the Superior Court of Lower Canada. The declaration set out the Appellant's title under a conveyance, dated the 13th of July, 1835, from one Horner and alleged that the Respondent afterwards became entitled to the upper dam, except the portion thereof sold to the Appellant, and that the Respondent intending to pre-

vent the Appellant from using and enjoying the water privilege so sold to him, and to deprive him of his just rights, wrongfully and illegally caused to be raised and kept open the gate in that portion of the dam which had belonged to, and been in possession and under the control of the Respondent; through which gate so raised and kept open by the Respondent, the water of the river collected above the dam, flowed and ran to waste, and had continually and constantly so run to waste during the period of ten years; that the Appellant was thereby deprived of the use of the water for the purpose of propelling and moving the wheels and machinery and the tannery: and his privilege had been during the same period, and then was, by the illegal and wrongful acts of the Respondent, rendered almost useless, and entirely so during dry seasons. That the Respondent, by raising and opening the gate and drawing of the water, had from time to time, caused a great quantity and weight of ice and other heavy bodies in the river to settle and rest down upon the dam, thereby breaking the supporter and timbers of the dam, and causing it to settle down and move from its position, and to crack and become leaky and insufficient to retain the water so as to enable the Appellant to use the same for the purpose of moving and working his wheels and machinery in and about the tannery; and that in consequence of the wrongful and illegal acts of the Respondent, the bark-mill and other machinery in his tannery had been idle for a great part of the time for several years then past, to the great damage of the Appellant; that the Respondent had suffered to run to waste through the gate a much larger quantity of water than would be sufficient for the driving of a grist-mill or the carrying on of its operations. That by law the Appellant, being the proprietor of land on the bank of the river, and of the water privilege and premises mentioned in the deed of sale to him, had a right to use the water of the river for manufacturing and other purposes while the same flowed adjacent to and over his lands and premises, but that he has been, and was, prevented from so doing by the acts of the Respondent. The declaration also complained of an injury to the Appellant's water power, by reason of the Respondent having raised the level of the water at the lower dam.

The Respondent, by his plea, claimed title through a conveyance, dated the 15th of March, 1831, from Horner to one Douglas, and of another conveyance dated the 21st of July, 1835, from Horner to Louis Guérout, to the portion of the upper and lower dam, and the grist-mill on the latter, described in and conveyed by those deeds; and alleged that the Respondent and his auteurs had for more than thirty years been in possession and occupation as proprietors of the

grist-mill; that the upper dam was, in fact, in existence and in use for the mill at and before the deed of same from Horner to the Appellant; that the Appellant's purchase was with full knowledge on the part of Horner and of the Appellant, of the right of the Respondent and his auteurs to the use and maintenance of the dam for the purposes of the mill; and that the pretended rights of the Appellant, so subsequently acquired, could not interfere with, affect, or diminish the rights of the Respondent and of his auteurs to the mill, and mill dam; that it was true that the Respondent opened the gate in the dam, from time to time, as necessary for the supply of water for his grist-mill, and had a right so to do; that the gate had in fact been made, and was in existence and use openly by all the auteurs of the Respondent for more that twenty years previous to the purchase by the Appellant from Horner of the emplacement in the Appellants' declaration described, and previous to the erection of the dam, as well as by Horner, the auteur of the Appellant, and others from whom Horner derived title. That the Appellant purchased the emplacement with the full knowledge of the existence of such gate, and that the water of the river retained by the dam flowed through the gate for the use of the mill, then owned by the Respondent; and that by law the Appellant had no right to complain of the Respondent in raising the gate, from time to time, for the use and working of the mill. That inasmuch as at certain seasons of the year and for several months of the summer, during dry seasons, there was a great scarcity of water in the river, the Respondent had always been willing and disposed so to use the water as to prevent the waste thereof and had not at any time wasted the same, but that the Respondent was entitled to open the gate so as to permit the water of the river to flow through the dam, and the Appellant had no right to complain of the acts of the Respondent. That without such gate and the free use of it for the working of his mill, the Respondent would for several months in each year be prevented from using his mill for want of water, as, from the situation of the land above the upper dam, the water of the river would not so accumulate at the dam as readily to overflow the dam and thereby reach Respondent's mill, but would be spread over an immense flat, pond, and swamp, extending for some miles above the dam.

The Appellant replied that the Respondent could only claim the right of drawing the water from the gate and dam through a flume; whereas, he had never constructed or had any flume connected with the upper dam, through which to convey the water to his grist-mill below, but had always, since he possessed the gate, drawn off the water through the gate

into the open river and caused the same to run to waste, and had injured and damnified the Appellant as complained of in the declaration.

Witnesses were examined on behalf of the Appellant and Respondent respectively, from whose evidence it appeared, that the upper dam was built after the sale by Horner to Douglas of the grist mill, and about a year before the transfer of it to Guerout, and that for many years the water had been allowed to flow through the gate in the upper dam to drive the grist mill.

From the evidence of Horner, it appeared that he built the dam for supplying water-power to the tannery of the Appellant, and to a saw-mill, then intended to be built above a bridge, and that the dam was not intended for supplying water to mills below the bridge; that the gate in the dam was built with the intention of having a flume connected with it to convey the water to the saw-mill intended to be built below the dam; but that no such mill had ever been built. That about 192½ yards below this dam there was another dam, which crossed the river, and a bridge lay between the dams, which were called the upper dam and the lower dam. Adjoining the lower dam was situated the grist-mill of the Respondent, which was worked by water-power, derived from the river by means of the lower dam and a flume connected therewith. It further appeared from the evidence, that on the 15th of March, 1831, Horner conveyed this mill to Douglas, subject to the keeping and upholding in repair one-third part of the mill dam, for the use of the mill. By Douglas the mill was conveyed to Guérout on the 17th of November, 1835, and by Guérout it was conveyed to the Respondent on the 5th of March, 1850. Besides being the owner of the mill, the Respondent, of the 5th of March, 1850, became the owner also of the plot of ground, formely of Horner, on the north side of the river, opposite to the Appellant's tannery, extending to the mid-stream of the river there, and including the northern moiety of the upper dam. The title to this plot, as appeared from the documentary evidence, was as follows:

—On the 21st of July, 1835, Horner conveyed it to Guérout, with the dam thereon erected and water privilege thereunto belonging, also with the right of drawing or carrying water in a flume across the tract thereby lastly reserved and mentioned, with the right and privilege of flowing such parts and parcels of certain lots in the conveyance specified, and of any other tracts of land then covered with water, flowing back from the said dam, but subject to the support and maintenance of the dam along with the Appellant. It appeared that on the 2nd of June, 1837, this conveyance was confirmed by a conveyance made to Guérout, by the sheriff of the district of

Montreal, under a writ of execution against Guérout; and ultimately, on the 5th of March, 1850, the plot was conveyed by Guérout to the Respondent by the same instrument by which the mill was conveyed to him as above mentioned. It also appeared that the mill was in existence in 1831, and some time previous; that in 1831, when sold by Horner to Douglas, it had two runs of stones, which had by the Respondent been increased to four runs of stones. Horner, in his evidence, further stated that he built the lower dam; and Douglas, in his evidence, stated that he had no water right above the bridge. No objection appeared to have been raised to the erection of the upper dam.

The Superior Court, on the 22nd of May, 1855, gave judgment (1) holding that the Appellant had established by evidence the material allegations of his declaration, so far as the

(1) Ce jugement a été rendu par les juges Day, Smith et Vanfelson. Voici les remarques faites par le juge Day en rendant ce jugement :

DAY, Justice : " The Plaintiff complains, 1st, that the Defendant has raised the lower dam, near which Defendant's grist-mill is situate, and thereby caused the water to flow back, so as to prevent Plaintiff's wheels and machinery from operating freely. 2. That he persists in opening a flood gate in the upper dam, and wastes the water, depriving Plaintiff of the water necessary for his tannery. The Plaintiff is proprietor of one end of the upper dam on the south, Defendant of the other on the north. With respect to the flowing back of the water, this rests on the allegation that the lower dam has been raised. We are with Defendant on this point. There is no evidence that it has been raised higher than it has always been, and the impression of the court is that it is not even so high. That part therefore of Plaintiff's action which prays for the taking down of the alleged addition to this dam, must be dismissed. On the other hand, it appears that Plaintiff is deprived of water, and there is evidence also, that Defendant will suffer if the gate is shut down. There is an evident conflict from scarcity of water. Then comes up the question, who is to have the preferential right? Both parties hold from the same *auteur*, John Horner. In 1831, Horner sold the grist-mill to Douglas; on the 13th July, 1835, Horner sold to Plaintiff his lot on the south side, and on the 21st of the same month he sells the lot on the *north* side to Guérout, from whom Defendant acquired. There is a clause in Plaintiff's deed of a preferential right to water for a grist-mill, which was intended to be built near the north end of the upper dam, but this does not extend to the old grist-mill, so that in so far as titles go, we consider Plaintiff is in the better position. As to the natural servitude, the riparian proprietor may make use of the water without consuming it, and without diverting it from its proper channel permanently, so as to injure an inferior proprietor. If there had been nothing to bind Defendant to maintain the upper dam, the proprietor of the lower mill and dam could have brought his action and have had the upper dam demolished; but he is part proprietor, and therefore he cannot complain of the upper dam. But, says Defendant, I bought the upper dam with a gate in it, and it was a visible servitude, but the answer to this is, that the gate *was for a new grist-mill* which was intended to be built. But, again, the opening of the gate does not necessarily, nor can it by any possibility, benefit Defendant. The water must either get through the upper dam or it must accumulate and flow over. In either case it must reach Defendant's lower dam, and how can Defendant suffer? We admit there is evidence to contradict this, but we think the water used by Plaintiff is not lost, and that the gate is not necessary for Defendant's mill. We must therefore order the gate in the upper dam to be kept shut. As to damages, even if Plaintiff had proved he had suffered any, he could not recover,

same related to the right of the Appellant to the use of the water of the river to be taken through the flume in the south end of the upper dam for the use of his tannery and all things thereunto belonging; and to the Respondent having caused to be raised and opened the gate in the upper dam lying north of the flume of the Plaintiff, whereby the Appellant was deprived of the use of the water of the river collected above the upper dam for his tannery; and the court declared that the Respondent had not at any time any right by law to raise or open the gate in the upper dam and draw the water of the river through the gate, so as to deprive the Appellant of the use thereof for his tannery, and ordered, that the Respondent should thereafter cease from drawing the waters of the river through the gate, and from depriving the Appellant of the use thereof. The Respondent appealed from this judgment to the Court of Queen's Bench of Lower Canada.

The Court of Queen's Bench, consisting of Sir H.-L. La Fontaine, Chief Justice, and the puisné Judges, Aylwin, Duval, and Caron, on the 12th of January, 1857, reversed the judgment of the Lower Court and dismissed the action (2), on the

because they could be claimed only after a sufficient notification and demand is shown. The protest filed is not sufficient."

Judgment rendered in the Superior Court: "The court, considering that Plaintiff hath established, by evidence, the material allegations of his declaration, in so far as the same relate to the right of him, Plaintiff, to the use of the water of the river Yamaska, to be taken through the flume in the south end of the upper dam, for the use of his tannery, and all things thereunto belonging, and to Defendant having caused to be raised and opened, and kept open, the gate in the said upper dam, lying north of the said flume of Plaintiff, whereby Plaintiff was and is deprived of the use of the water of the said river, collected above the said upper dam for his said tannery, doth adjudge and declare that Defendant hath not, nor had he at any time right by law to raise or open the said gate in the said upper dam, and to draw the water of the said river through the said gate so as to deprive Plaintiff of the use thereof for his said tannery, and all things thereunto belonging; and doth order that Defendant shall hereafter cease and desist from drawing the water of the said river though the said gate, and from depriving Plaintiff of the use thereof for the purposes aforesaid, and considering that, by law, Plaintiff is not entitled to recover any damages by reason of the causes and grievances in the said declaration set forth, and hereinbefore adjudged upon, inasmuch as the rights of the parties in the premises have not heretofore been ascertained and settled by judicial decision, and considering further that Plaintiff hath failed to prove the material allegations of his declaration, in so far as the same relate to the pretended addition to, and elevation of the lower dam, and the flowing back of the waters of the said river by reason thereof, upon the tannery and premises of Plaintiff, doth dismiss all that part and portion of Plaintiff's action and demand whereby he seeks to recover damages."

(2) Ci suivent les remarques faites par les juges en appel et le jugement rendu par cette cour :

CARON, J : La Cour Inférieure a accueilli les prétentions de l'Intimé, et par son jugement dont est appel, elle dénie à l'Appelant le droit d'ouvrir la pelle en question pour l'usage de ses moulins d'en bas. Les motifs de ce jugement sont : 1° que le Défendeur n'a pas besoin d'ouvrir cette *pelle*, et qu'il ne souffrira pas de ce qu'elle reste fermée ; 2° que l'Appelant est privé du droit

following grounds: That Horner, by his act of the 15th of March, 1831, having sold to Douglas two lots of land in the village of Granby, and the grist-mill then erected in the river

qu'il s'arroge par suite de l'acte ou titre du Demandeur ; 3° que la pelle (gate) en dispute avait été pratiquée pour les fins d'un moulin que l'on devait construire et non pour ceux déjà construits à la chaussée d'en bas ; pour moi, il me paraît que le jugement est correct, et que chacun de ces motifs est justifié par la preuve.

1. Si le Défendeur a droit de conduire l'eau de cette façon à ses moulins, c'est au moyen d'une dalle (flume) ; qu'il fasse une dalle, et il aura à son moulin autant d'eau que la chose est possible, sans diminuer la quantité nécessaire au Demandeur. Les témoins disent qu'il s'y perd plus d'eau qu'il n'en faudrait pour faire mouvoir une moulange. Au reste, le Demandeur n'absorbe pas l'eau ; la chaussée d'en haut peut retenir quelque temps l'eau de la rivière, mais il faut ensuite qu'elle passe la chaussée et aille toute à celle du Défendeur ; ainsi il aura toute l'eau indépendamment de la *pelle*, et la cour a eu raison de dire qu'il ne souffrirait pas de ce que la *pelle* fût fermée. 2. Le moulin dont est question en l'acte, est un moulin à construire, et non celui d'en bas. Je fonde mon opinion : 1° sur les termes de l'acte, *a grist-mill*, et non pas, *the grist-mill* ; 2° sur le témoignage de Horner, qui peut bien expliquer l'intention qu'il avait en faisant la porte en question à la chaussée ; 3° sur ce que dit Douglas, qui n'a jamais eu de prétentions à la chaussée d'en haut, ni à l'ouverture en question. L'ensemble des actes et du témoignage me font croire que les deux chaussées ont été deux établissements parfaitement distincts, et nullement faits pour s'aider l'un et l'autre puisque Horner n'avait rien à faire lorsqu'il construisait la chaussée d'en haut avec l'établissement d'en bas, qui, alors, appartenait à Douglas, qui l'a vendu à Guérout, de qui Horner l'a ensuite acquis. 3. C'est assez dire que je suis, pour ces raisons, d'avis que la Cour Inférieure avait droit de dire que l'Appelant était repoussé par les termes de l'acte, le titre de l'Intimé.

Telle étant la conclusion à laquelle je suis arrivé, il est inutile d'examiner la question de savoir quels seraient les droits respectifs des parties d'après la loi commune, et indépendamment de leurs titres et conventions, lesquelles ne sont pas dans le cas d'invoquer cette loi, toutes deux ayant prétendu que leurs difficultés devaient être réglées d'après ces mêmes titres. La question de droit, au reste, me paraîtrait être aussi contre le Défendeur, et en faveur du jugement. Le principe, en fait d'eau commune, est : " Que toute disposition " des eaux, en pure perte, doit être sévèrement prohibée." (1) De la preuve, il résulte que l'usage de la porte nuit au Demandeur, arrête son usine, que cet usage est cause qu'une quantité d'eau considérable est perdue pour toutes les parties. Sans nuire au Demandeur, le Défendeur peut se procurer, sans la porte (gate), plus d'eau qu'il n'en a d'après les arrangements actuels. Le jugement me paraît devoir être confirmé.

Sir L. H. LaFontaine, Bart., Juge-en-Chef : Les parties possèdent deux usines sur la petite rivière de Granby, dans le township de ce nom, dans les limites du lot de terre n° 8 du 7e rang de ce township. L'usine de l'Appelant consiste dans un moulin à farine, et celle de l'Intimé dans une tannerie, distante l'une de l'autre d'environ seulement 30 à 40 perches. La tannerie est établie à la partie supérieure de la rivière dont le cours se dirige de là vers le moulin de l'Appelant. Deux dames ou écluses, traversant la dite rivière, sont construites en ces deux endroits, la dame supérieure immédiatement au-dessus de la tannerie ; et la dame inférieure de même au-dessus du moulin à farine. De l'une et de l'autre, l'eau est conduite dans ces deux usines respectivement par un canal d'écluse (*a flume*). Dans cet espace la petite rivière Granby est traversée par un pont ; la tannerie est en haut de ce pont et le moulin à farine en bas. Au-dessus de l'écluse supérieure, l'eau forme un étang de plusieurs milles d'étendue, et en arrivant à cette écluse, le courant la porte

(1) 2 Daviel, n° 588, p. 144.

Granby, with all its dependencies, there was comprised in the sale the privilege of the flow of water for the use of the mill; that subsequently Horner, having by an act of the 13th of

plus rapidement vers le côté nord que vers le côté sud. C'est de ce dernier côté qu'est la tannerie de l'Intimé, et le canal d'écluse (*flume*) qui doit servir à l'alimenter. Dans la partie nord de l'écluse ou dame supérieure, il y a une porte ou bonde qui sert à retenir ou à laisser échapper l'eau, qui, dans ce dernier cas, se dirige vers le moulin de l'Appelant, qu'elle sert à alimenter au moyen de son canal d'écluse. L'Appelant prétend avoir le droit, quand il le juge nécessaire au service de son usine, de lever la bonde de l'écluse supérieure ; c'est ce qu'il a fait constamment depuis qu'il est devenu propriétaire de cette usine. L'Intimé lui dénie ce droit. De là la difficulté qui a donné lieu à ce procès en dommage intenté à l'Appelant par l'Intimé. L'action de ce dernier se divise en deux parties principales : l'une par laquelle il prétend que l'Appelant n'a aucun droit de toucher à la bonde ou porte de l'écluse supérieure, qui, en restant fermée, et retenant en conséquence l'eau de ce côté, sert à l'alimentation de sa tannerie, conformément au privilège qu'il en a acquis du nommé John Horner ; et que l'Appelant, en ouvrant la porte de l'écluse pour en faire échapper l'eau, contrevient à ce privilège, arrête l'opération de sa tannerie en diminuant le volume d'eau qui devrait s'écouler par son canal d'écluse, et par là fait un tort considérable à l'Intimé. Dans l'autre partie de son action, l'Intimé allègue que l'Appelant, par de nouveaux ouvrages faits récemment, a haussé outre mesure l'écluse de son moulin, ce qui a eu l'effet de faire refluer l'eau vers le terrain de l'Intimé, de l'inonder et d'obstruer par là l'exploitation de sa tannerie, autre cause de dommages dont se plaint l'Intimé. Cette cause a été jugée à Montréal, le 22 mai 1855, en faveur de l'Intimé sur le premier point de la contestation, et contre lui sur le second point. Le Demandeur n'a pas interjeté appel de la partie de ce jugement qui lui est défavorable. Nous n'avons donc sur l'appel du Défendeur Gilmour, à nous occuper que de sa prétention à faire usage de la bonde de l'écluse supérieure, en la levant ou baissant à volonté, pour les besoins de son moulin. Il paraîtrait qu'à une certaine époque antérieure à l'année 1835, les deux emplacements des parties Appelante et Intimée, sur lesquels leurs usines respectives sont établies, ont appartenu au même individu. Il peut se faire, quoique cela n'apparaisse pas clairement, que cet individu, John Horner, était originairement également propriétaire de tout l'espace qui se trouve entre ces deux emplacements, ou au moins d'une partie de cet espace. Quoi qu'il en soit, nous le voyons, à la date du 15 mars 1831 par acte devant Dickinson, notaire, vendre au nommé James Douglas deux lots dans le village de Granby, nos 21 et 22, et de plus, " the grist-mill erected at the falls with the water " privilege on the said lot and the machinery and yard thereunto belonging, " or in any wise appertaining, and all the estate, right, title, interest, pro- " perty, claim and demand whatsoever of the said John Horner, junior, of, " in, to or out of the said two village lots and premises..... without any " exception or reserve." Le moulin ainsi vendu par Horner à Douglas est celui qui se trouve au bas de l'écluse inférieure. Dans l'ordre des dates des titres produits par les parties, vient celui de l'Intimé. C'est un acte de vente du 13 juillet 1835 (Dickinson, notaire), par lequel Horner vend à l'Intimé un petit lopin de terre, faisant partie du lot nº 8, " situated at the *south-end* of " the dam *erected* across the river above the bridge, beginning at low water " mark, etc.... with the right and privilege of water to be taken through the " flume *now* erected in the south end of the said dam, sufficient to supply a " tannery, and all things thereunto belonging, but the taking of such water " shall in no wise ever interfere or impede the driving of a grist-mill or its " operations, which it is hereby well understood and agreed that the said " grist-mill shall at all times have *the preference of water* to carry on its " works, and all things thereunto belonging ; subject the said Harlow Minor " to the keeping at all times a tight flume, and to the supporting and keeping " in repair so much of the said dam as shall be found *south* of the said flume, " and other the appurtances and dependencies whatever thereunto belonging,

July, 1835, sold to the Appellant a little piece of land situate at the south end of the dam then erected by the vendor across the river, at some distance above the grist-mill, with the right

" or in any wise appertaining." Dans cet acte du 13 juillet 1835, il est dit que le terrainainsi vendu par Horner à l'Intimé, appartenait au vendeur en vertu d'un acte de vente qui lui en avait été fait par John Wetherbe, le même jour, passé devant Dickinson, notaire. Il y a lieu de croire, d'après les circonstances qui ressortent en preuve, que, bien que cet acte de vente par Wetherbe à Horner porte la date du 13 juillet 1835, ce dernier en avait néanmoins fait l'acquisition et en était en possession dès auparavant, soit par vente verbale ou autrement. La dame dont il s'agit dans cet acte de vente du 13 juillet 1835, à l'Intimé, est la dame ou écluse supérieure mentionnée ci-haut. Elle avait donc été érigée, avec le canal d'écluse (*flume*) aussi mentionné dans cet acte, soit par Horner, soit par ses auteurs et non par l'Intimé. Il faut remarquer que ce canal d'écluse était du côté du sud, c'est-à-dire du côté de l'emplacement que l'Intimé venait d'acquérir, et que, s'il est vrai que celui-ci obtenait le privilège de faire écouler l'eau par ce canal, ce privilège était, d'après la convention des parties, subordonné à l'usage que le vendeur pourrait faire de la même eau pour faire mouvoir *un* moulin à farine, lequel moulin, selon les termes de la même convention, devait avoir la *préférence*, c'est-à-dire l'usage de l'eau arrêtée par l'écluse de préférence à celui que l'Intimé obtenait la permission d'en faire pour l'exploitation d'une tannerie au sud de la rivière, c'est-à-dire, en d'autres mots, que si le volume d'eau que l'écluse supérieure avait pour objet d'utiliser devenait insuffisant au fonctionnement des deux usines en même temps, celle que le vendeur Horner pourrait exploiter dans des limites raisonnables de manière à compter naturellement sur la force motrice de ses eaux, devait avoir la *préférence*. Autrement la stipulation de préférence que je viens d'indiquer n'aurait aucun effet, aucun sens quelconque. Il est à remarquer que, dans cette stipulation, il ne s'agit pas d'un *moulin à scie*, ni nommément d'un moulin à farine que le dit John Horner ferait lui-même construire par la suite, ainsi que le prétend l'Intimé sur la foi seule du témoignage de ce même Horner, mais bien *d'un* moulin à farine sans autre indication spéciale. Ainsi la stipulation pouvait s'appliquer également à *un* moulin à farine quelconque que le dit Horner pourrait acquérir déjà tout construit, dans les limites du courant d'eau dont il retenait l'usage de *préférence* à l'Intimé, de même qu'à un nouveau moulin à farine qu'il ferait lui-même construire par la suite dans les mêmes limites. Peu de jours après la vente qu'il avait ainsi faite à l'Intimé, Horner vend à Louis Guérout, par acte du 21 juillet 1835, (Dickinson, notaire), un lopin de terre faisant partie du dit lot n° 8, " to be " *taken* out of that part of the said lot situated upon the *north side* of the " *river* passing across the south end of the said lot, bounded on one side " *towards* the south by the centre or middle of the said river, on the other " side *towards* the north by the road now travelled, on one side towards the " *west by* the King's highway, and on the other side towards the east by the " *easterly* side line of the said lot." On en excepte deux emplacements déjà vendus à des tiers. Cette vente du 21 juillet 1835, est de plus faite " with " *the dam* thereon *erected* and water privilege thereunto belonging. also with " *the right* of drawing or carrying water in a flume across the tract lastly " *hereby* reserved, also with the right and privilege of flowing such parts and " *parcels* of lots n°s 5, 6 and 7, in the 7th range, and lot n° 4 in the 8th " *range*, or any other tracts or parcels of land as are now covered by the " *water flowing* back from the said dam, but subject to the support and " *maintenance* of the said dam along with Harlow Minor (Respondent,)..... " or *such* part as the said Harlow Minor is bound to maintain by his deed," c'est-à-*dire* par l'acte du 13 juillet 1835. L'on voit que la dame dont il s'agit dans *cet* acte du 21 juillet, est la dame supérieure, et que le privilège que le dit *John* Horner, par l'acte de vente à l'Intimé, s'était réservé de faire usage, même *de préférence* à ce dernier, du courant d'eau que cette dame avait pour objet *d'u*tiliser, est compris dans la vente ainsi faite à Guérout. Celui-ci est donc *sub*stitué à Horner dans la jouissance et l'exercice de tous ses droits. Le

to employ the water through a channel then made in the southern end of the dam, sufficient for the use of a tannery ; but nevertheless, by a stipulation expressed in the act of the 13th

17 novembre 1835 (Gagnon notaire), James Douglas, vend à Louis Guérout : " 1° nn emplacement contenant un demi-arpent ou environ en superficie..... " prenant en front au chemin du roi, en profondeur au terrain de Richard " Frost, d'un côté au sud-est à un lot vacant appartenant au vendeur, et de " l'autre côté au nord-ouest à Gardner Childs, avec une *maison en bois à deux* " *étages* dessus construite ; 2° *un moulin à farine* situé sur la rivière au dit " village de Granby, avec le droit d'occupation du terrain sur lequel le dit " moulin est situé, ainsi que le fonds d'icelui, *le tout enclavé dans le terrain du* " *dit acquéreur*, et tous ses droits généralement quelconques dans l'usage " d'une *chaussée* ayant servi jusqu'ici à faire tourner le dit moulin, lequel " moulin le dit vendeur vend au dit acquéreur avec les allants et tournants, " *et tous les droits qu'il a lui-même à cause du dit moulin et chaussée*, terrain et " chemin qui y conduit, *tels qu'ils lui ont été accordés à lui-même* par son " vendeur John Horner et le dit Richard Frost," savoir le dit acte du 15 mars 1831, auquel le dit Richard Frost était intervenu. Guérout voulant obtenir une confirmation de ses deux titres d'acquisition, eut recours pour cela à un décret forcé qui fut poursuivi sur lui à la requête de sa mère en vertu d'un jugement obtenu à cette fin. A ce décret Guérout se rendit adjudicataire des lots ainsi décrétés. Les deux titres du shérif sont en date du 2 juin 1837. L'un a rapport au moulin à farine par lui acquis de Douglas ; on y lit ces mots : " with a flour and saw-mill, with all waters, water courses and " mill privileges thereto belonging." L'autre a rapport au terrain que Guérout avait acquis de John Horner, le 13 juillet 1835, et on y trouve la désignation suivante : " a lot of ground of an irregular figure.... 1 acre and 60 perches " in superficies,.....with the dam thereon erected and water privilege there- " unto belonging, also with the right of conveying water in a flume across the " lot of ground belonging to Wallace Heard, also the right and privilege of " flowing such parts and parcels of lots or any other tracts and parcels of " land as are now covered by the water flowing back from the said dam, but " subject to the support and maintenance of the said dam, along with one " Harlow Minor, as the same is bound to maintain," c'est-à-dire par acte du 13 juillet 1835 (Dickinson, notaire). Par acte du 14 février 1850 (Morrison, notaire), (produit par le témoin Alexander Massie), Guérout vend au nommé David Harvey, meublier, un emplacement sur le côté nord de la rivière et du côté est du pont, c'est-à-dire entre le pont et l'écluse supérieure, et commençant aux eaux basses, " together with the right of laying down a flume or " canal, *from the dam* laying east of the said tract, and of drawing *from it* " one square foot of water through penstock erected from said flume or canal, " to be applied said square foot of water towards the working and turning of " a cabinet maker's work machine, sleigh making business in all its branches, " but not for other or any pretense whatever." Il est déclaré que cet emplacement vendu à Harvey faisait partie d'un lot de terre que Guérout avait acquis par vente du shérif en date du 2 juin 1837, c'est-à-dire du lot de terre qu'il avait originairement acheté de John Horner par l'acte du 21 juillet 1835. Puis on lit la stipulation suivante : " The said Harvey shall be bound and " subject to support and repair one quarter part of the *dam now existing* " above the lot now sold, or of such other dams as shall or may be hereafter " erected." Enfin, par acte en forme de donation onéreuse du 5 mars 1850 (Belle, notaire), Guérout qui paraît avoir possédé plusieurs terrains dans le même endroit, autre que ceux qu'il avait acquis de Douglas et de John Horner, cède ces mêmes terrains ainsi que les deux derniers à l'Appelant, sous la réserve de la portion qu'il venait de vendre à Harvey. Les deux terrains dont il s'agit en cette cause, sont désignés dans cet acte de donation de la même manière qu'ils l'avaient été dans les deux titres du shérif du 2 juin 1837. Ainsi, depuis le 5 mars 1850, l'Appelant se trouve substitué en tous les droits du dit Guérout, quant à l'usage à faire de l'eau que l'écluse supérieure a pour objet d'utiliser. Cet usage doit être au moins le même que celui que le dit John

of July, 1835, the privilege thus ceded was subordinate to the vendor using the water for a grist mill, which was to have the preference, that is to say, the use of the water retained

Horner avait droit d'en faire après sa vente à l'Intimé, du 13 juillet 1835, voir même celui que Douglas, lorsqu'il était propriétaire du moulin à farine de l'Appelant, aurait pu en faire lui-même, s'il y avait droit. Constatons d'abord qu'il résulte de la preuve : 1° que l'écluse n'était pas encore construite lorsque John Horner vendit son moulin à farine à Douglas, qu'elle ne l'a été qu'environ un an *avant* la vente faite par Horner à l'Intimé, et qu'elle a été ainsi construite par Horner lui-même ; 2° que, pendant quelques mois, durant les eaux basses, le moulin à farine de l'Appelant pourrait à peine fonctionner, même avec une seule moulange, s'il n'avait pas la faculté de lever la bonde de l'écluse supérieure. Avant la construction de cette écluse, Horner, et, après lui, son successeur Douglas, avait, pour faire mouvoir le moulin à farine, l'avantage de toute l'eau de la partie supérieure de la rivière, dans son cours naturel ; et il est constaté qu'à raison de l'abaissement de son niveau en approchant du moulin, le cours en était le plus rapide en cet endroit. Horner a vendu à Douglas le moulin en question, avec tous les avantages de la force motrice qui existait alors. S'il est vrai que l'érection de l'écluse supérieure, la bonde restant fermée, a l'effet de diminuer cette force motrice, Douglas et ses successeurs ont dû en souffrir dans l'exploitation du moulin. Horner pouvait-il après avoir vendu à Douglas, contrevenir par son propre fait, à la jouissance des avantages qu'il avait cédés à ce dernier ? La manière dont il construit l'écluse supérieure nous fait voir qu'il a senti lui-même qu'il ne devait pas ainsi contrevenir. De là la porte ou bonde qu'il a pratiquée dans l'écluse, du côté nord ; de là l'usage que Douglas et ses successeurs, dans la propriété du moulin. ont constamment fait de cette porte pour en faire échapper l'eau au besoin, et cela depuis la construction de cette écluse, c'est-à-dire, depuis 1833 ou 1834, au vu et au su du dit John Horner et de l'Intimé ; de là, encore, la rétention que le dit John Horner stipule, dans son acte de vente à l'Intimé, du privilège de se servir de l'eau, le cas échéant, de *préférence* à l'Intimé. Ce privilège a passé à Guérout, et de celui-ci à l'Appelant. Mais l'Intimé prétend que cette stipulation ne devait avoir d'effet qu'à l'égard d'un moulin que John Horner avait alors l'intention de construire en haut du pont, et près de l'écluse supérieure, et que ce moulin n'ayant jamais été construit, la stipulation n'a pu avoir d'effet jusqu'ici. Pour soutenir cette prétention, il invoque ce que John Horner dit dans son témoignage : " the said upper dam was built for the " purpose of carrying on a tannery for Mr. Minor and a *saw-mill for myself.* " The *grist-mill* referred to in the said deed (deed of sale to Minor of the 13th " July, 1835), was a grist-mill intended to be built above the said bridge. The " said upper dam was not built for the purpose of supplying water to mills " situated belowthe said bridge." Ainsi parle aujourd'hui M. Horner, témoin de l'Intimé. Mais ce témoignage ne peut être reçu. La stipulation écrite est la seule qui subsiste, et la seule qui doit servir de règle de décision en cette matière. L'une des parties n'a pas le droit d'y ajouter après coup au préjudice de la partie qui, de bonne foi a acquis ses droits, d'après le sens naturel de cette stipulalion écrite. Or, dans cette stipulation, il n'a pas été du tout question de *moulin à scie ;* il n'y a été question que d'un moulin à farine que le dit John Horner serait dans le cas d'exploiter : et la stipulation, d'après ses termes et le sens naturel qu'on doit lui reconnaître, comprenait aussi bien un moulin déjà existant dont Horner pouvait faire l'acquisition que tout autre moulin nouveau qu'il aurait pu lui-même faire construire, que le moulin, dans l'un ou l'autre cas, fut érigé en haut ou en bas du pont. Il n'y a pas une telle restriction dans la stipulation. Au reste cette restriction eût été indifférente à l'Intimé. Il devait suffire que ce moulin se trouvât dans un endroit où, pour être aidé dans son fonctionnement, l'exercice du privilège stipulé par Horner pouvait devenir nécessaire, dans les limites raisonnables jusqu'auxqu'elles pouvait agir la force motrice des eaux, qu'on avait voulu créer par l'érection de l'écluse supérieure. A ce point de vue que je crois justifié par les faits de la cause, il me semble qu'on ne peut faire autrement que d'arriver à cette conclu-

by the dam in preference to that which the Appellant obtained permission to employ for his tannery; that the preference could be applied to any grist-mill whatever that Horner could

sion, c'est que si, après sa vente à l'Intimé, Horner, au lieu de vendre à Guérout la dame supérieure et le terrain avoisinant du côté du nord, ainsi que le privilège de faire usage des eaux retenues par cette dame, pour le service d'un moulin à farine, en avait gardé la propriété, et avait réacquis de Douglas le moulin à farine qu'il lui avait vendu en 1830, et qui appartient aujourd'hui à l'Appelant, il aurait eu le droit d'invoquer pleinement à son profit, pour faire fonctionner ce moulin devenu le sien, le bénéfice de la stipulation dont il s'agit. Or, ce droit a été par Horner transféré à Guérout, et celui-ci l'a transféré à l'Appelant. Ce dernier doit donc être admis à l'exercer aussi amplement que Horner aurait pu le faire. L'Intimé avoue lui-même qu'il n'aurait pu dénier à Horner, ou à l'Appelant, son successeur, l'exercice de ce privilège, s'il se fût agi d'un nouveau moulin construit en haut du pont et au bas de l'écluse supérieure. C'est au moins, il faut le reconnaître, admettre l'existence du privilège. Eh bien, il résulte de la preuve que l'exercice de ce privilège, pour alimenter un moulin à farine, construit dans cet endroit, eût été plus préjudiciable à l'Intimé, qu'il ne peut l'être lorsqu'il se borne à alimenter le moulin de l'Appelant. Quelle raison a donc l'Intimé de se plaindre? Voudrait-il, par pur caprice, ne reconnaître la valeur du privilège de l'Appelant, qu'en autant que l'exercice de ce privilège ferait sa condition moins bonne qu'elle n'est à présent. Dans une autre occasion, l'Intimé a formellement reconnu que le privilège dont il s'agit n'avait pas été stipulé pour s'appliquer seulement à un moulin nouveau, mais bien pour s'appliquer également au moulin de l'Appelant. Cela résulte de son protêt signifié à l'Appelant, en date du 5 septembre 1850 (Bondy, notaire), peu de temps après l'acquisition de l'Appelant. Dans ce protêt, il ne nie pas que ce privilège appartienne à l'Appelant; au contraire il admet que celui-ci a droit à l'exercice de ce privilège en vertu de l'acte de vente fait à son auteur, Guérout, par le dit John Horner, le 13 juillet 1835. Il se plaint seulement que l'Appelant a outrepassé, excédé les limites de ce privilège, dans l'exercice qu'il en a fait. Si la preuve constate ce fait, elle constate par cela même que l'Intimé a souffert des dommages, et, dans ce cas, la Cour Supérieure aurait dû lui en adjuger; cependant elle ne lui en a pas adjugés; elle a même dit formellement que l'Intimé n'avait pas prouvé ses allégués à cet égard. Cette cour a donc reconnu que l'Appelant n'avait pas, dans l'exercice d'un privilège que l'Intimé admet lui appartenir, outrepassé, excédé les limites de ce privilège. Je dois ajouter qu'il me semble, d'après la preuve, que l'Intimé avait raison de se plaindre du mauvais état dans lequel l'Appelant laissait, faute de réparations, l'écluse supérieure, et que la cour de première instance aurait dû accueillir sa demande de dommages à cet égard. Mais, l'Intimé n'ayant pas interjeté appel, nous n'avons pas à réformer cette partie du jugement qui lui est défavorable.

Enfin, la seule question que nous avons à décider, est celle de l'existence, au profit de l'Appelant, du privilège dont j'ai parlé, et si, ce privilège existant, la preuve constate qu'il en a mésusé, je suis d'avis que les titres des parties établissent ce privilège; l'Intimé en a reconnu lui-même l'existence; et la Cour Supérieure, en refusant de lui adjuger des dommages, a par cela même déclaré qu'il n'y avait pas de preuve que l'Appelant eût outrepassé, excédé les limites de son privilège, dans l'exercice qu'il en avait fait. Je dois donc conclure que Gilmour est bien fondé dans son appel.

" La cour: 1° considérant que le nommé John Horner a par acte du quinze mars mil huit cent trente et un (Dickinson, notaire), vendu au nommé James Douglas, deux lots de terre dans le village de Granby, et un moulin à farine alors érigé sur la petite rivière de Granby, tel qu'indiqué sur le plan produit en cette cause avec toutes ses dépendances, et que dans cette vente fut compris le privilège du courant d'eau en cet endroit (water privilege) y attaché; 2° considérant que plus tard, savoir, par acte du treize juillet mil huit cent trente-cinq (Dickinson, notaire), le même John Horner a vendu à l'Intimé un petit lopin de terre situé à l'extrémité sud d'une écluse alors érigée par le ven-

acquire, even already constructed within the limits of the water-flow which was the subject of the stipulation, as also to any new grist-mill which he might construct within the same limits ; that in consequence, the stipulation might be applied to the grist-mill which Horner had sold to Douglas, in case Horner should become anew the proprietor of it ; that in virtue of the act of sale of the 21st of July, 1835, from Horner to Guérout, the latter stood in the place of his vendor in relation to the Appellant as regarded the act of the 13th of the same month, and that by another act of the 17th of Sep-

deur à travers la susdite petite rivière, à quelque distance en haut du susdit moulin à farine avec le droit et privilège de l'eau en la faisant passer par un canal d'écluse alors déjà érigé du même côté sud de la dite écluse, en quantité suffisante pour le service d'une tannerie, que néanmoins, par une stipulation expresse dans le dit acte du treize juillet mil huit cent trente-cinq, le privilège ainsi cédé à l'Intimé a été subordonné à l'usage que le vendeur pourrait faire des mêmes eaux pour faire mouvoir un moulin à farine, lequel moulin, aux termes de la dite stipulation, devait avoir la préférence, c'est-à-dire, l'usage de l'eau retenue par la dite écluse, de préférence à celui que l'Intimé, par le susdit acte, obtenait la permission d'en faire pour l'exploitation d'une tannerie au sud de la dite rivière ; 3° considérant que la dite stipulation de préférence pouvait s'appliquer à un moulin à farine quelconque que Horner aurait pu acquérir, déjà tout construit, dans les limites du courant d'eau qui faisait l'objet de la dite stipulation, de même qu'à un nouveau moulin à farine qu'il aurait pu lui-même construire par la suite dans les mêmes limites ; que par conséquent la dite stipulation pouvait s'appliquer au susdit moulin à farine que Horner avait vendu au dit James Douglas, comme susdit, dans le cas où Horner en serait de nouveau devenu le propriétaire ; 4° considérant qu'en vertu d'un acte de vente du vingt et un juillet mil huit cent trente-cinq (Dickinson, notaire), fait par Horner, à Louis Guérout, ce dernier s'est trouvé au lieu et place de son vendeur vis-à-vis de l'Intimé, en ce qui regarde le dit acte du treizième jour du dit mois de juillet ; et que, par un autre acte en date du dix-sept novembre mil huit cent trente-cinq (Gagnon, notaire), Guérout a acquis de Douglas le moulin à farine ci-dessus mentionné, que ce dernier avait acquis du dit John Horner, qu'en conséquence la stipulation de préférence dans le dit acte du treize juillet mil huit cent trente cinq, devait s'appliquer à ce moulin du moment qu'il a été acquis par Guérout, qui lors de cette acquisition était aux droits du dit John Horner, vis-à-vis de l'Intimé ; 5° considérant que l'Appelant, en vertu de la donation onéreuse que Guérout lui a faite par acte du cinq mars mil huit cent cinquante (Belle, notaire), est aux lieu et place et aux droits du dit Guérout, tels qu'exposés ci-dessus, et que, par conséquent, pour l'exploitation de son dit moulin à farine, il est bien fondé, lorsque l'état des eaux le rend nécessaire, de mettre à son profit la susdite stipulation de préférence, que son auteur, le dit Horner, a fait insérer dans le dit acte de vente à l'Intimé, du treize juillet mil huit cent trente-cinq ; 6° considérant qu'il n'est pas établi par la preuve en cette cause, que l'Appelant ait abusé de son droit de se servir de l'eau retenue par la susdite écluse, bien que par là le volume d'eau nécessaire au service de la tannerie de l'Intimé ait pu quelquefois être diminué d'une manière préjudiciable à ce service ; 7° considérant qu'il résulte de ce que dessus que dans la partie du jugement dont est appel, c'est-à-dire la partie du jugement qui porte condamnation contre l'Appelant en faveur des prétentions de l'Intimé, il y a mal jugé : infirme la susdite partie du dit jugement qui porte ainsi condamnation contre l'Appelant, (le dit jugement rendu par la Cour Supérieure siégeant à Montréal, le vingt-deux mai mil huit cent cinquante-cinq), et cette cour, procédant à rendre le jugement que la Cour Supérieure aurait dû rendre à cet égard, déboute l'Intimé de la partie de son action contre l'Appelant, qui a été maintenue par le susdit jugement de la Cour Supérieure. (L'honorable M. le juge Caron *dissentiente.*)

tember, 1835, Guérout had acquired of Douglas the grist-mill which the latter had acquired of Horner, and in consequence the stipulation of preference in the act of the 13th of July, 1835, ought to be applied to the mill from the moment that it had been acquired by Guérout; that the Respondent stood, by the deed of the 5th of March, 1850, in the place of Guérout with his rights as above expressed, and that, in consequence, he was justified, whilst the state of the water rendered it necessary, in taking advantage of the stipulation of preference which Horner had inserted in the act of sale to the Appellant of the 13th of July, 1835; that it was not established by the evidence in the cause that the Respondent had abused his right to use the water retained by the dam, though the volune of water necessary for the tannery of the Appellant had sometimes been diminished in a manner prejudicial to its business.

The appeal was from this judgment.

The case case was twice argued by the same counsel: First, on the 18th and 19th of June, 1858, and afterwards, by direction of Their Lordships, on the 2nd of December, 1858.

Mr. Wilde, Q. C., and Mr. Unthank, for the Appellant; and Mr. Manisty, Q. C., and Mr. Ayrton, for the Respondent.

The argument of the Appellant was, that the Respondent and his auteurs never gained a right to the lower dam, so as to prevent him using the water flowing to his tannery, and that the Respondent having control over the upper dam, had improperly kept the gate open and prevented the flow of the water; as the right to the use of the dam was, as between the Appellant and Respondent, regulated by conveyances dated the 13th of July, 1835, and the 21th of July, 1835, mentioned in the judgment appealed from.

On the part of the Respondent it was contended, that Horner, under whom both the Appellant and Respondent claimed conveyed to the Respondent his mill, with the requisite use of the water for the same, before the conveyance was made to the Appellant of any right to the use of the water for his tannery; that the Appellant's conveyance was made expressly subject to the right of water for a mill, which right had become vested in the Respondent, and that the acts complained of were done in due exercise of such a right; that the Respondent's mill was erected prior to the Appellant's tannery, and the water had been used by the Respondent in the manner complained of for a period of time sufficient to confer a right thereto.

The authorities referred to as bearing upon the question of the respective right of the parties to the use of the water of the river Granby were: By the law of Lower Canada

Douet's Princ. of the law of Lower Canada, art. 186, pp. 189, 265; Pandects of Jus., lib. 43, tit. 13, art. 1; Pothier, tome 17, p. 520 (édit. Paris, 1823).

The following english authorities were also referred to: *Embrey* vs. *Oven* (1), *Liggins* vs. *Inge* (2), *Wood* vs. *Waud* (3), *Greatrec* vs. *Haynard* (4), *Bealy* vs. *Shaw* (5), *Masson* vs. *Hill* (6), *Wright* vs. *Howard* (7), Gale *on easements*, pp. 132-37; Woolwych *on waters*, pp. 263, 267. And, by the American law, 3 Kent's *Comm.*, p. 544, *Tyler* vs. *Wilkinson* (8).

The consideration of the judgment was postponed, and was now delivered by Lord Kingsdown.

In this case, Minor, the Appellant, is the owner of a piece of land on the south side of the river Yamaska, upon which land a tannery has been constructed. The Respondent is the owner of a piece of land on the north side of the river immediately opposite to the land of the Appellant; and he is also the owner of a piece of land on the same or north side of the river lower down the stream, on which a grist-mill stands, which is worked by means of the water-power afforded by the river. Across the river, from the land of the Appellant to the land of the Respondent, a dam has been erected, and in this dam there is what is termed a flume, or *conduit*, for the purpose of conveying the water held back the dam to the Appellant's tannery. In the northern half of this dam there is a sluice or gate, by opening which the water is drawn away from the dam, and from the Appellant's tannery, and is sent down the channel of the river. The Appellant insists, that the Respondent having the control over this gate, has improperly opened it, and kept it open, and has thereby wrongfully withdrawn the water from the tannery, to the great injury of the Appellant.

The court before which the case came in the first instance decided that the Respondent had no right so to open the gate to the injury of the Appellant, and make a declaration to that effect, followed by an order restraining the Respondent from the like acts in future. From this decision an appeal was brought to the Court of Queen's Bench of Lower Canada, which reversed the order complained of, and dismissed the Appellant's action. From this last decision the case has been brought by appeal to Her Majesty in Council. The titles of the parties appear to stand thus. In the year 1831, Horner was the owner of all the lands now in question whether belonging to the Appellant or Respondent. Previously to that year the

(1) 6 Exch. Rep., 353. (2) 7 Bingh, 682. (3) 3 Exch. Rep., 748.
(4) 8 Exch. Rep., 291. (5) 6 East., 208. (6) 3 Bar. et Ad., 304.
(7) 1 Sim et Ster., 190. (8) 4 Mason's V. S. Rep., 400.

grist-mill now belonging to the Respondent had been erected, with a dam of a certain height, across the stream, by means of which the water was employed to work the mill. On the 15th March, 1831, Horner sold and conveyed to James Douglas, amongst other things, this grist-mill, with what is termed in this conveyance the " water-privilege " on the lot on which it stood, and the machinery and yard thereunto belonging or in any wise appertaining, and all his estate and interest therein. In 1834, Horner erected the dam which is the subject of the present dispute, and which is higher up the stream that the dam of the grist-mill, and on the 13th July, 1835, he conveyed to Minor the lot of land now belonging to him, which is described in the conveyance as a lot of land situate at the south end of the dam erected across the river, together with the right and privilege of water to be taken through the flume now erected on the south end of the said dam sufficient to supply a tannery and all things thereunto belonging.

It seems that at this time Horner contemplated the erection of a grist-mill on the opposite side of the river, on the land there now belonging to the Respondent, and that mill was to be worked by means of the water collected at the dam, which was also to serve the tannery, and that he intended that the grist-mill so to be erected should have a preference with respect to the supply of water over the tannery, and accordingly the conveyance to Minor, after referring to such intention, provides that the taking of water for the use of the tannery shall in no case ever interfere with or impede the working of the grist-mill so intended to be erected, and that the grist-mill shall at all times have the preference of water to carry on its works and all things thereunto belonging. The deed then provides that Minor shall all times keep a tight flume and shall support and keep in repair so much of the said dam as shall be found south of the said flume. On the 21st July, 1835, Horner sold to Louis Guérout the piece of land on the north side of the river, with the right of drawing water from the dam by means of a flume across certain lands belonging to Horner, but not included in the conveyance to Guérout; and Guérout bound himself to maintain and keep in repair so much of the dam as Minor, by his deed, was not bound to support. It is material to consider what at this time were the several rights of Douglas, of Minor, and of Guérout, all claiming under Horner, on the assumption that Horner had a right, before the execution of any of these deeds, to deal with the water of the river as he pleased. Having sold and conveyed to Douglas, in the first instance, the mill and the right to the use of the stream for the purpose of working it, he could not afterwards derogate from that grant by a subsequent conveyance

to other persons interfering with it. No diversion or interruption of the stream could be made by Horner which would prejudicially affect the mill in the state in which it was sold by him to Douglas, nor could be convey to others the right of doing what he could not do himself. On the other hand, as between Minor and Guérout, each was bound to maintain his share of the dam; each was entitled to the use of the water, the one for a grist-mill, the other for a tannery: but the right of the tannery to the use of the water was to be subject to a preferential right on the part of the owner of the grist-mill. Douglas was an entire stranger to the conveyances made to Minor and Guérout; he could claim nothing under them: he could suffer nothing from them; he had a clear right to insist that neither the use of the water for the new grist-mill, nor the use of the regular supply of the water for his tannery, should interfere with the regular supply of the water for his mill in its then state, which had been granted before either Minor or Guérout had any title to their several estates. The obligations of Minor and Guérout to each other, and to Horner as to maintaining the dam, in no degree affected the right of Douglas to insist that, whether kept in repair or not, it should not be so used as to damage his mill. Such being the rights of the parties, on the 17th of November, 1835, Douglas sold and conveyed his property in this grist-mill to Guérout, and this conveyance seems to have been confirmed by a subsequent deed of the 2nd June, 1837, the particulars of which are not important to the present purpose. Guérout then stood in the position of Douglas, and, as claiming under him, he had a right to insist that the upper dam should not be so used as to injure the fair working of the old mill. Minor could not possibly acquire a better right for his tannery, by reason of Guérout being the purchaser of Douglas' mill than he would have had if any stranger had purchased it. On the other hand, Guérout, by being the owner of the upper dam, or of that portion of it in which the gate was placed could not acquire any greater right to have it opened and kept open, than he would have had if it had belonged to a stranger; he had a greater facility of opening it, because it was under his own control, but his right was not altered. As owner of Douglas' mill, he had a right to remove any obstruction to the flow of the water for the fair use of his mill. As the owner of the gate, he had the means, by opening it, of removing that obstruction without violence, or the necessity of applying to any third person. Again, as claiming under Horner, Guérout was bound to keep his side of the dam in repair, and not to permit the water to leak or to run to waste, so as to prejudice the Appellant's tannery. On the 5th March, 1850, all the rights of Guérout in the

lands in question were transferred to Gilmour, the Respondent. No grist-mill was ever erected by Guérout or by Gilmour on the plot of land conveyed to Guérout by Horner in 1835, nor was any flume constructed for the purpose of drawing away the water from the dam erected above that plot. But it appears that two pair of stones were added to the grist-mill on the lower part of the stream, which had become the property of Guérout in the manner already described. Both the tannery and the grist-mill continued to be used by their respective owners, without any dispute which led to litigation, until the institution of the suit out of which the present appeal arises. During all this period it is alleged by the Respondent that he had been in the constant habit of opening the gate in upper dam, whenever it was requisite to do so, for the purpose of working the grist-mill. In the month of September, 1853, the action in this case was commenced by the Appellant Minor against the Respondent; and it will be desirable to examine, with some minuteness, the pleadings in the action, and the judgments, in order to see what questions—and what questions alone—are open to consideration by Their Lordships on the present appeal. The Appellant, in his declaration, after stating the conveyance to him by Horner, and the establishment of his tannery, and that the Respondent had become the owner of the opposite plot of land, and that no grist-mill had ever been erected on the said plot, alleges that the Defendant has, "nevertheless, illegally, unjustly, and maliciously, during several years last past, to wit, for a period of ten years, opened, and caused to be kept open, a certain gate, which was, and is, in that portion of the said dam lying north of the said flume which has been, and now is, in the possession and under the control of the Defendant, through which gate so raised and kept open by the said Defendant as aforesaid, the water of the said river, collected above the said dam, flows, and runs to waste, and has continually so run to waste during the aforesaid period of ten years; and that the Plaintiff has been, and is thereby, deprived of the use of the said water, for the purpose of propelling and moving the wheels and machinery of the said tannery, and his said privilege has been during the said period, and now is, by the said illegal and wrongful acts of the said Defendant, rendered almost useless, and entirely so during every dry season." He then alleges that the dam itself is injured and broken by the ice brought down upon it in winter by means of the water being so drawn off, and proceeds: "That the said Respondent has wrongfully and illegally, during the period of ten years, drawn off, and caused and suffered to run to waste, as aforesaid, through the said gate, as well as through the leaks, cracks, and openings by the Defendant, as

aforesaid, in the said dam, a much larger quantity of water than would be sufficient for the driving of a grist-mill or the carrying on its operations. That, by law, the Plaintiff, being the proprietor, as aforesaid, of lands on the banks of the river, and of the water privileges and premises mentioned in the said deed of sale, hath a right to use the water of the said river for manufacturing and other purposes while the same flows adjacent to and over his said lands and premises, but that he has been, during the ten years aforesaid, and is, prevented from so doing by the aforesaid wrongful and unjust acts of the Defendant." He than alleges that he has sustained damage by these acts to the extent of £225 currency, and prays that he may be paid the amount of these damages, and that it may be declared that the Defendant has no right to raise or open the said gate, in the said dam, above mentioned, and to draw the water through the said gate, and to deprive the Plaintiff of the use thereof, and that the Defendant may be ordered to desist from drawing water through the said gate, and from depriving the Plaintiff of the use thereof. He made another complaint against the Defendant of his having raised the lower dam to the prejudice of the Plaintiff, but this matter was decided in favour of the Defendant, and is not the subject of appeal. In February, 1854, the Respondent filed his plea or answer to this declaration, and thereby, after stating his title under the deeds already mentioned, he alleges: "That the Defendant and his *auteurs* have for more than thirty years past, had in possession and occupation, as proprietors, the grist-mill and premises in the Plaintiff's declaration referred to, which mill is situated at a distance of thirty-seven perches below the dam in the Plaintiff's declaration referred to;" and he annexes a diagram showing the situation of the two dams. That the dam, at the Defendant's mill, was built about thirty-nine years since for the use of the said mill and other works therewith connected and adjoining thereto, and has been constantly ever since kept and maintained by the Defendant and his *auteurs* in possession of the mill and premises therewith connected and says it was in existence when the Plaintiff's tannery was erected. With respect to the upper dam, he says, "that he has always hitherto done and performed all such acts, and made such repairs, and such only, as were necessary for the maintenance of the dam, and which the Defendants was bound to perform and do under his said title; that the Defendant hath never contested nor interfered with Plaintiff in the exercise of his rights under the said title, nor with his, the Plaintiff's right of taking or using the water at the dams for the use of the Plaintiff's tannery and other works; nor hath he at any

time injured the dam, or done any other matter or thing whereby damage could be or was incurred by the dam or Plaintiff's works. And he further says: "That true it is, that Defendant opened a certain gate in said dam from time to time as was necessary for the supply of water for his said grist-mill, and had and hath a right so to do; that the said gate had, in fact been made, and was in existence, and used openly by all the said *auteurs* of the said Defendant, for many years, to wit, for more than twenty years, previous to the purchase by the Plaintiff, from said John Horner, of the *emplacement* in Plaintiff's declaration described, and previous to the erection of the said dam, as well by the said Horner, the *auteur* of the Plaintiff, as others from whom the said Horner derived title. That the Plaintiff purchased the said *emplacement* with the full knowledge of the existence of said gate, and that the waters of the river retained by the said dam flowed and must flow through the said gate for the use of the said mill, now owned by the said Defendant, and that thereby, and by law, the Plaintiff hath no right to complain of the Defendant in raising the said gate from time to time, and at all times, necessary for the use and working of his said mill; that inasmuch as at certain seasons of the year, and for several months of the summer, during dry seasons, there is a great scarcity of water in said river, the Defendant hath always been willing and dispose so to use the said water as to prevent the waste thereof, and hath not any time wasted the same, but the said Defendant was, by reason of the premises and his said titles, and is now, entitled to open the said gate so as to permit the water of the river to flow through the said dam, and the Plaintiff hath no right to complain of such acts of the Defendant, nor can he obtain the conclusions of his said declaration in reference to said gate. "That without such gate, and the free use of it to the Defendant, for the working of his said mill, he, the Defendant, would for several months in each year be prevented from the using his said mill for want of water, inasmuch as from the peculiarity and situation of the land above said upper dam, the waters of said river would not so accumulate at said dam as readily to overflow the said dam, and thereby reach the Defendant's mill, but would be spread over an immense flat and pond and swamp, extending for some miles above said dam, of all which the Plaintiff was, and has been, well aware." The Defendant, therefore, did not deny his liability to keep his part of the upper dam in repair, but he alleged that he had done so. He did not insist on any right to waste the water, or to take more than was necessary for his mill, but he denied that he had done so. He rested his right to open the gate, not exclusively (if at all) on the prefer-

ential right to water reserved to a grist-mill in the conveyance by Horner to the Appellant, Guérout, but on the general law, and the fact that his mill has been built and was in use, with the necessary flow of water, long before the Appellant had any right or interest in the matter. To this plea the Appellant, on the 10th of February, 1854, filed a replication, in which he insisted that the Respondent could make no defence under the conveyance from Horner to Guérout; he denied that the Respondent had kept his part of the upper dam in proper repair, or that the Respondent and his auteurs had been accustomed to open the gate for the purposes of the grist-mill: but he did not allege that any alteration had been made in the grist-mill, or that by reason thereof, or for any other reason, the Defendant, as owner of the grist-mill, had lost or prejudiced any right to whatever use of the water could originally have been claimed in its favour. The cause being at issue, a great many witnesses were examined and documents produced on each side, and on the 22nd of May, 1855, the Superior Court (in which the action was brought) pronounced its judgment, by which it declared, it effect, that the Plaintiff (the present Appellant) had established the material allegations of his declaration, so far as the same relate to the right of him, the Plaintiff, to the use of the water of the Yamaska to be taken through the flume on the south-end of the upper dam, in the said declaration described, for the use of his tannery, and all things thereunto belonging, in the manner by the Plaintiff in his declaration set forth; and to the Defendant having caused to be raised and opened, and kept open, the gate in the said upper dam lying north of the said flume of the Plaintiff, whereby the Plaintiff was and is deprived of the use of the said water of the said river collected above the said upper dam for the said tannery, and the whole as set forth in the said declaration; and it is, therefore, adjudged and declared that the Defendant hath, nor had he at any time, right, by law, to raise or open the said gate in the said upper dam, and to draw the water of the river through the said gate, so as to deprive the Plaintiff of the use thereof for his tannery and all things thereunto belonging; and it is ordered that the Defendant shall hereafter cease and desist from drawing the waters of the said river through the said gate, and from depriving the Plaintiff of the use thereof. The court then decides that the Plaintiff is not entitled to any damages, inasmuch as the rights of the parties had not been theretofore ascertained and settled by judicial decision. The court, therefore, determined the Defendant had no right for any purpose to open the gate in the dam so as to withdraw the water from the Plaintiff's tannery; but it

must have held that as to any wrongful or malicious exercise of the right, if the right existed, any excessive use of the water, or waste of it by leakage of the dam occasioned by the Defendant, or by reason of other wrongful acts of his, no case had been made out; otherwise, of course, the Plaintiff would have been entitled to damages. From this part of the decision there was no appeal; but the Defendant appealed to the court of Queen's Bench from so much of the judgment as established the right of the Plaintiff to prevent the gate from being opened by the Defendant. On hearing the appeal, the court, confining itself to the question of right, which alone was before it, reversed the decision of the court below, and dismissed the Plaintiff's suit. The court appears to have founded its opinion on the effect of the conveyance by Horner to Minor and Guérout, and to have held that the preference of the right to water reserved out of the grant to Minor, might be exercised by Horner, or the Respondent claiming under him, in favour either of any grist-mill which might be built, or of any such mill which, being already built, might come into the hands of the same proprietor, with the plot of land sold to Guérout. There appears to Their Lordships to be considerable difficulty in maintaining the decision upon the grounds on which it has been rested below. It is very true that the conveyance to Guérout does not confine the right to draw the water from the upper dam to any particular grist-mill thereafter to be built, and it may be, and probably is, quite true, that the injury to the Appellant's tannery would be as great if the water were drawn away from it by means of the flume contemplated by the deed to Guérout, as it is by the withdrawal of it by means of the gate which is actually opened; indeed, some of the Respondent's witnesses state that the injury would be greater. But it appears to Their Lordships that the Appellant having purchased the right to use the water, subject only to a preference in favour of a mill thereafter to be built, and which preference is to be exercised in a particular mode, cannot be bound by its exercise in a different mode and in favour of a different mill. The question, therefore, must depend on the general rules of law as applied to the facts appearing in the case. The titles of the respective parties have already been stated, and the question being one merely of right, the evidence is material only as it bears upon that question. The evidence appears to Their Lordships to show, on the one hand, that the tannery may be, and in fact often is, deprived of the water necessary its supply by the opening of the gate in the dam, as practised by the Defendant; and, on the other hand, that unless the gate be so opened, the Respondent's mill must suffer great inconvenience, and cannot, in

dry weather, be worked at all, and, indeed, must be stopped for several months in the year. With respect to the usage which has prevailed, it appears to Their Lordships that the result rather shows that this gate has always been kept open whenever the use of the grist-mill, required it, and that though no such usage has been proved as to constitute in itself a prescriptive right in favour of the mill, there is abundantly sufficient to show that there never has been any acquiescence, by the owner of the grist-mill, in any obstruction created by the upper dam, nor any compromise or abandonment of his right to the use of the water, whatever that right may originally have been. It being necessary, therefore, that the tannery should suffer if the gate be opened, and that the mill should suffer if the gate be closed, the question for determination is, whether the Appellant, the Plaintiff in the action, has established a right to have the gate kept closed, and has proved that the Respondent is a wrong-doer in opening it. The onus is upon him. The law upon the subject, which is the French law prevailing in Lower Canada, was examined and discussed by the counsel at the bar, in the course of the two arguments which Their Lordships found it expedient to require, with great learning and ingenuity. It did not appear that, for the purposes of this case, any material distinction exists between the French and the English law. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. Now, it being established by the evidence that the closing of this dam does inflict a most serious injury upon the Respondent, upon what grounds can the Appellant insist that he has a right to close it? He cannot say that the use of the water by the Respondent for his mill is not a lawful use; for such right as he has, were acquired from the person under whom the Respondent claims, and with knowledge of the previous grant made to the Respondent. It is not necessary to discuss any doubtful prin-

ciples of law, or to inquire whether, under other circumstances, the Appellant could or could not insist, as against him, that the use of the water by the Respondent for his mill is not a lawful use; it is sufficient here to say that the case must be dealt with as if it arose between Horner and Douglas, before the sales to either Minor or Guérout. Could Horner, having sold the mill with the use of the water to Douglas, have afterwards insisted on a right to intercept the regular flow of the water to the prejudice of that mill? Their Lordships are of opinion that he could not. The question as to the stones added to the mill, and the injury done to the upper dam, and the neglect on the part of the Respondent to keep it in repair, are removed from consideration for the reasons already assigned. The sole question is, whether the Appellant, the Plaintiff in the action, has, in the suit, established a right to obstruct the flow of the water to the prejudice of the Respondent; if he has not such right, the Respondent was justified in removing the obstruction, doing no unnecessary injury to the Appellant. Their Lordships think that the Appellant has failed to establish his right to maintain such obstruction, and that his suit has, therefore, properly been dismissed. They must advise Her Majesty to affirm the judgment complained of; but in consequence of the great difficulty of the case, and of the affirmance proceeding upon different grounds from those on which the judgment appealed from was pronounced, they will recommend that the affirmance should be without costs. (9 *D. T. B. C.*, p. 115, et 12 Moore's Privy C. Rep., p. 131.)

BILLET PROMISSOIRE.—ENDOSSEUR.

SUPERIOR COURT, Québec, 17 janvier 1859.

Before MEREDITH, Justice.

JONES *vs* WHITTY.

Le Défendeur avait endossé un billet qui n'était pas négociable; le Demandeur le transporta par endossement à S; S poursuivit le Défendeur comme premier endosseur, et l'action fut renvoyée, le Demandeur ayant subséquemment poursuivi le Défendeur, son endosseur immédiat:

Jugé: Que la cour avait bien jugé en renvoyant l'action de S, en autant que le second endosseur d'un billet non négociable ne peut donner droit d'action à son cessionnaire contre le premier endosseur; mais que le Demandeur, second endosseur, avait droit d'action contre le premier endosseur de ce même billet. (1)

MEREDITH, Justice: This action is founded on a promissory note, not negotiable, made by our Burrage, in favor of Defen-

(1) *V.* S. du C. de 1890, 53 V., ch. 33, s. 55 et 88.

dant and by Defendant indorsed to Plaintiff. The Defendant pleads that, after his indorsement of the note, David Ramsay Stewart having become the holder of it, sued Defendant as first indorser; and that Stewart's action, dismissed with costs. The Defendant further avers that Stewart is still the holder of the note, that Plaintiff is a mere *prête-nom*, and that, by reason of the judgment aforesaid, the right of Stewart to recover the amount of the note from Defendant has become a *chose jugée*. The proof establishes that Plaintiff was not, at the time of the institution of the present action, the real owner of the note sued upon; but, as Plaintiff is the actual holder of the note, for the purposes of collection, which is proved by his having produced and filed it in this cause, with the knowledge and consent of the only other person interested in it, Stewart, that is sufficient to enable him to maintain the present action. (1) As to the plea of *chose jugée*, it cannot be maintained, because, not only the parties in this cause are not the same as those in the former action, but the cause of action is different. An essential part of the title of Stewart was the indorsement of Jones, but that indorsement is not alleged, and could not have been alleged, in the present action. It only remains to be observed that although Stewart's action against the present Defendant was properly dismissed, inasmuch as the second indorser of a promissory note, not negotiable, cannot, by his indorsement, give his indorsee an action against the first indorser; yet Plaintiff, as second indorser, can sue Defendant as the first indorser, on the indorsement from the latter to the former, the authorities on this subject leave no doubt on the point. In *Hill* vs. *Lewis*, 1 Salkeld, 132 (ch. justice Holt, presiding), the court held that the indorsement of a note which has not the words " or to his order" is good " so as to make the indorser chargeable to the indorsee." And Bayley, in his work on Bills, page 98, refers to that case, and lays down the law on this subject, as follows: " Bills or notes containing no words to make them assignable " may, where the stamp laws do not prevent it, be assigned " so as to give the assignee a right upon them against the " assignor." These authorities were referred to and acted upon by the late Court of King's Bench for this district, in the case of *Jones* vs. *Hart*, (2) in which the court, in an action upon a note, not negotiable, expressly declared that the act of indorsing a note is equivalent to a new drawing.

Upon these grounds, I overrule the plea of *chose jugée*, and declare that the Plaintiff, as the actual holder of the note, and

(1) 2 *R. J. R. Q.*, p. 289, *Mills* vs. *Philbin* et al

(2) 2 *R. J. R. Q*, p. 149.

as the immediate indorsee from Defendant, has a right to maintain his present action. (9 *D. T. B. C.*, p. 149.)

HOLT and IRVINE, for Plaintiff.

ALLEYN, Hon. C., for Defendant.

CODE.—SECONDE ACCUSATION.

QUEEN'S BENCH, CROWN SIDE, Montréal 9 décembre 1858.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL and CARON, Justices.

REGINA *vs.* WEBSTER.

Jugé: Qu'un prisonnier qui a subi son procès sur une accusation de félonie et est trouvé coupable seulement d'une tentative de la commettre, ne peut être soumis à un nouveau procès sur aucune autre accusation fondée sur les mêmes faits. (1)

Webster having been tried on an indictment for rape, the jury returned a verdict of "guilty of an attempt to commit rape." Whereupon a motion was made on the part of Defendant," that the verdict of guilty rendered by the jury be set aside and reversed, and a new trial granted and awarded for the following reasons: 1° because illegal and improper evidence was adduced on the part of the prosecution, foreign to the charge contained in the indictment, and calculated to prejudice Webster in his defence, namely: evidence of the administration of chloroform with intent to commit rape, in support of the indictment, notwithstanding the alleged administration of chloroform formed the basis and foundation of another charge, in respect of which Webster was indicted before this court; 2° because the evidence so adduced, if credible, tented to establish that Defendant had been guilty of a felony as created by statute, and not of the misdemeanor of which he was convicted; 3° because evidence of another felony distinct from that which the prisoner was tried for was received on the part of the prosecution and induced the rendering of the verdict in question; 4° because the verdict is illegal, unjust and oppressive, being entirely unsustained by any evidence whatever of Defendant having committed an attempt to commit rape; 5° because the verdict was and is manifestly and clearly contrary to the evidence adduced on the said trial; 6° because the verdict was rendered contrary to the charge of the learned judges who presided, and in view of the evidence adduced, entirely unjestified, and

(1) V. art. 711 Code Criminel.

manifestly against law and justice. And Defendant further moves, that, in the event of a new trial being refused, the judgment of this honorable court upon the verdict rendered, declaring him guilty of an attempt to commit rape, be stayed and arrested, for the following among other reasons: 1° because the charge contained in the indictment is wholly and altogether insufficient in law, and the indictment is informal, null and void; 2° because the evidence adduced in support of the charge contained in the indictment, did not warrant the finding of the jury; 3° because it was not, under the circumstances, disclosed upon the prosecution, competent for the jury to return a verdict of guilty of an attempt to commit rape, such offence being made a felony by the statute, and one not charged in the indictment; 4° because the indictment did not contain any charge to warrant the verdict rendered in this cause."

The judges, before adjudicating on this motion, referred the question to the Court of Appeals and signed the following statement of the case: "At the last term of the Court of Queen's Bench, held in the city of Montreal, for the district of Montreal, John Horatio Webster was tried upon the following indictment: "The jurors for our Lady the Queen, upon "their oath, present, that John Horatio Webster, late of the "city of Montreal, in the district af Montreal, dentist, on "the twenty-second day of September, in the year of our "Lord, one thousand eight hundred and fifty-eight, at the "city of Montreal aforesaid, in the district of aforesaid, in "and upon one Louisa Chandler, wife of one James Nicholds, "in the peace of God and of our Lady the Queen, then "being, violently and feloniously, did make an assault, "and her, the said Louisa Chandler, then violently and "against her will, feloniously did ravish and carnally did "know; against the form of the statute in such case made "and provided, and against the peace of our Lady the "Queen, her crown and dignity." Evidence was adduced on both sides, and on the case being closed the jury were directed by Mr. Justice Aylwin to negative the felony of rape, inasmuch as the same was not established by the evidence; but they were told at the same time that, if they believed the statement made by Louisa Chandler, they were at liberty to return, as their verdict, that the prisoner was guilty of an attempt to commit the felony charged, or of an assault only; adding, however, that they would be justified in returning a verdict of not guilty altogether. The verdict of the jury was that the prisoner was not guilty of rape, but guilty of an attempt to commit a rape, and they recommanded him to mercy. Now, the evidence upon which the verdict is based,

if to be believed at all, amounted to proof of a substantive felony under the statute of this province, passed in the year 1855, chapter 92, section 29, but one other than that charged in the indictment ; such evidence having established in effect, that the prisoner a dentist professionally employed by the prosecutrix to examine her mouth, for the purpose of manufacturing a set of artificial teeth and alleging a necessity for the extraction of a decayed tooth, on the occasion in question, had administered chloroform to her, and while she was under the influence of that agent, and lying on a sofa, had pulled up her clothes, and attempted to have carnal knowledge of her. The proof, on the part of the female, raised the inference that the intent of the prisoner in administrating the chloroform, was to have connection with her, against her will, that is actually to commit the crime of rape. Such being the case, and as the prisoner is liable to be tried for, and convicted of the latter felony, upon the same facts and transaction upon which the verdict for the misdemeanor of an attempt to commit rape was given as aforesaid, a question arose, upon a motion in arrest of judgment, whether, upon the indictment tried, and upon the evidence so adduced in support of the same, the prisoner could legally be found guilty of the said misdemeanor, or whether, in case of the felony of rape, the only offence charged in the indictment being negatived by the jury and the evidence amounting, as aforesaid, to proof of the statutory felony above described, the jury should not have been directed to acquit the prisoner altogether upon said indictment. In the opinion of the undersigned, who then held the court, that question of law was one which required to be reserved for the consideration of the Court of Queen's Bench, on the appeal side thereof, judgment upon the conviction was postponed, and the prisoner was committed to the common goal, until the decision of the judges of the court, on the appeal side thereof, is given by us, in conformity with the present case stated and signed by us, in conformity with the provisions of the Provincial Statute of 1857, chapter 44. (Signed,) L. H. LAFONTAINE, Chief-Justice. T. C. AYLWIN, Justice.

Thursday the ninth day of December one thousand eight hundred and fifty-eight. After hearing counsel, as well on behalf of the prisoner John Horatio Webster, as for the Crown, and due deliberation had on the case transmitted to this court, from the Court of Queen's Bench, sitting on the crown side, at Montreal, it is considered and adjudged by the court, now here, pursuant to the statute in that behalf, that there is no course to arrest the judgment of the court upon the conviction of John Horatio Webster for misdemeanor and

and attempt to commit a rape, whereof he stands convicted, and it is hereby ordered that judgment be given thereon, against the prisoner, at the session or term of said court, at Montreal, now next ensuing, in due course of law. (*Dissentiente*, the Honorable Sir Louis Hypolyte Lafontaine, Baronet, Chief-Justice.) (9 *D. T. B. C.*, p. 196.)

MONK, Q. C., pro Regina.

DEVLIN, for Prisoner.

DECRETS.—BREF DE POSSESSION.

BANC DE LA REINE, EN APPEL, Montréal, 2 mars 1857.

Présents : Sir L. H. LAFONTAINE, Baronet, Juge-en-Chef, AYLWIN, DUVAL et CARON, Juges.

DELESDERNIERS, Appelant, *et* BOUDREAU, Intimé.

Jugé : Qu'un bref de *possession*, sur décret forcé, ne peut être émané contre une personne qui n'est pas partie en cause, et que la personne expulsée, sous un tel bref, peut se pourvoir en complainte et réintégrande, et a droit de recouvrer des dommages. (1)

Le 25 juin 1850, Delesderniers obtint un jugement contre Macaire, et, en vertu de ce jugement, fit saisir, sur ce dernier, une terre de 4 arpents de front sur 30 de profondeur, située dans la seigneurie de Vaudreuil, avec une maison en bois, étables et autres bâtiments dessus construits. Etant devenu adjudicataire de ce lot, il obtint un bref de possession enjoignant au shérif de le mettre en possession du lot en question, et d'en expulser l'Intimé qui occupait, disait l'Appelant, une maison érigée sur la terre. Le bref fut mis à exécution par le shérif, et l'Intimé expulsé de la maison qu'il occupait. L'Intimé se pourvut devant la Cour de Circuit de Vaudreuil, demandant d'être remis et réintégré en la possession de son lopin de terre et maison, et réclamant £22, à titre de dommages-intérêts, et dépens. La cause évoquée à la Cour Supérieure fut renvoyée à la Cour de Circuit, qui finalement débouta l'action de l'Intimé. La Cour Supérieure, saisie de nouveau de l'affaire, sur appel, infirma le jugement de la Cour de Circuit, et le 25 octobre 1853, rendit le jugement qui suit : " THE COURT, considering that Defendant hath failed to establish, by evidence, the material allegations of his exceptions, and that the pretended writ of possession therein set forth was and is, in so far as the same relates to Plaintiff, absolutely null and void, and ought so to have been held by the court below, and that,

(1) V. art. 712 C. P. C.

by reason thereof, there is error in the judgment of the court below, rendered on the 4th day of July, 1853, doth reverse, annul and set aside the said judgment ; and, proceeding to render the judgment which the court below ought to have rendered, doth order and adjudge that Plaintiff be remitted and put in possession of the lot of land described in the Plaintiff's declaration, and Defendant is hereby forbidden to trouble Plaintiff in his possession, and Defendant is also condemned, within fifteen days after service upon him of this judgment, to abandon the detention and illegal possession of said lot and premises, to enjoy, use, make and dispose of the same, as he may think fit, and in default of Defendant so doing without the above delay, Defendant shall be constrained by all lawful ways and means and the court doth further condemn the Defendant to pay to Plaintiff the sum of £10 damages and costs." La cause portée devant la Cour du Banc de la Reine, siégeant en juridiction d'appel, a été jugée comme par la Cour Supérieure, tant sur le mérite, en autant que la maison occupée par l'Intimé ne faisait pas partie de l'immeuble décreté, que sur la question de forme, la cour étant d'opinion que l'adjudicataire n'avait d'autre moyen d'obtenir mise en possession de la maison, au cas qu'il y eût droit, que l'action pétitoire, et non le procédé sommaire adopté par l'Appelant. (9 *D. T. B. C.*, p. 201.)

LORANGER et POMINVILLE, pour l'Appelant.

HUBERT, OUIMET et MORIN, pour l'Intimé.

MINEUR.—ACTION.

BANC DE LA REINE, EN APPEL, Montréal, 9 juillet 1857.

Présents : Sir L.H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL, et CARON, Juges.

HISLOP, Appelant, *et* EMERICK et al., Intimés.

Jugé: Que dans une action pour séduction intentée contre un fils mineur, en déclaration de paternité, et contre son père, tant en sa qualité de père qu'en celle de son tuteur naturel, le fils mineur n'est pas légalement représenté, et ne peut être appelé à ester en jugement et à répondre à l'action. (1)

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, différant : L'Appelant, prétendant que sa fille, qui est *mineure*, a été séduite par George Emerick, fils *mineur* de l'Intimé, Henry Emerick, dirige une action contre ces deux derniers, à l'effet

(1) V. art. 304 C. C.

de faire déclarer ; 1° que George Emerick est le père de l'enfant dont la fille de l'Appelant est accouchée : 2° que Henry Emerick, *individuellement* et comme *tuteur naturel* de son fils, sera tenu de payer au Demandeur la somme de £500, pour dommages, frais de gésine, et pour le soutien de l'enfant, Quant à la question de fait, celle de savoir si c'était avec raison que George Emerick pouvait être recherché à l'occasion de la paternité de l'enfant, je suis d'avis que la preuvre justifie l'attribution qui lui est faite de cette paternité ; et l'on peut inférer du jugement dont est appel que telle a été l'opinion de la cour de première instance. Mais elle a débouté l'Appelant de sa demande sur deux motifs : le premier, qui regarde le père de George Emerick, est que le Demandeur n'a pas réussi à établir que ce père fût responsable envers lui des dommages qu'il réclame ; le second motif, qui regarde George Emerick, est qu'étant mineur, il ne pouvait pas être poursuivi sans être représenté par un tuteur ou curateur dûment nommé. Ce dernier motif présente la principale question de droit sur laquelle je diffère d'opinion d'avec la majorité de la cour. Je crois que d'après la jurisprudence des arrêts, sous l'ancien droit français une action de cette nature, en autant qu'il s'agit de se pourvoir contre un mineur en déclaration de paternité, et en paiement des dépenses que doit entraîner le soutien de l'enfant, est bien dirigée contre ce mineur, lorsqu'on assigne son père conjointement avec lui, pour le représenter et ester avec lui en justice, sans qu'il soit nécessaire de le faire assister d'un tuteur ou curateur spécialement nommé à cet effet. Je crois que la condamnation qui interviendrait contre le mineur sur une telle procédure, serait une condamnation régulière et valable. Les deux Défendeurs ont comparu par le même procureur, et le père a eu recours à la défense ordinaire au fond en en fait, en ajoutant néanmoins spécialement au nom de son fils, que celui-ci n'était point coupable des faits qui lui étaient imputés, et que, s'il était vrai que la fille du Demandeur eût accouché d'un enfant, il fallait que ce fût des *œuvres* de quelqu'autre personne. D'abord, quant à la responsabilité personnelle du père. Sans entrer dans la question, si controversée, de savoir si, en pareil cas, le père du séducteur mineur peut être actionné personnellement pour dommages et intérêts, lorsqu'il n'a point participé à la mauvaise conduite de son fils en favorisant son commerce illicite, toujours est-il qu'il nous est attesté par plusieurs auteurs, (1) que, lorsqu'il y avait eu une telle participation de la part du père, il était tenu personnellement responsable. Dans l'espèce présente, cette participation n'ayant pas été prouvée, la jurisprudence que je

(1) Fournel, pp. 75, 76.

viens de mentionner tend à justifier la première partie du jugement dont est appel, celle qui renvoie le père des conclusions *personnelles* prises contre lui. Mais si le mineur séducteur ne pouvait pas, sans l'assistance d'un tuteur ou curateur *ad hoc*, être recherché en justice en réparation civile, il me semble que cette assistance devrait nécessairement être requise dans tous les cas, que le père eût favorisé, ou non, son commerce illicite, puisque, dans ce système, la nécessité de cette assistance ne pouvait prendre son origine ailleurs que dans le fait de la *minorité* du Défendeur poursuivi en déclaration de paternité. Si, dans une instance de cette nature, le père pouvait être recherché à raison de sa participation à la mauvaise conduite de son fils, il faut avouer que ce n'était que pour un fait qui lui était personnel. Il est facile de concevoir que, pour un tel fait, il pût être appelé à répondre en son propre nom ; mais comment concevoir que ce fait, qui est pour le moins aussi infamant que celui reproché à son fils, pût par lui-même donner au père, en cette qualité seule de père, l'autorité d'ester en justice *pour* et *avec* son fils mineur, en un mot, d'être, sans nomination spéciale, son tuteur, son représentant légal, tandis que, s'il n'eût pas participé à la faute ou au délit de son fils, le père quoiqu'innocent, n'aurait pas été habile à représenter son fils, sans avoir été, au préalable, nommé tuteur ou curateur *ad hoc*. Cependant, en pareil cas, dans l'ancien droit français, nous voyons maints exemples où le mineur était, ou poursuivi seul, ou poursuivi conjointement avec son père, celui-ci en cette dernière qualité seule, comme censé représenter son fils. Dans le *Dict. des arrêts* de Brillon, nous trouvons plusieurs cas analogues cités, et, particulièrement, au tome 3e, p. 538, nous trouvons rapporté un arrêt du 26 février 1712, qui condamne le Sieur de la Fosse et la Demoiselle ****, chacun en 3 livres d'aumône, et de la Fosse à se charger de l'enfant, à payer 1000 francs de dommages et intérêts à la mère, et consigner entre les mains d'un notable bourgeois pareille somme de 1000 francs pour pourvoir à l'établissement de l'enfant. Le garçon avait alors 24 ans 10 mois, et la fille 16 ans seulement ; c'est-à-dire que tous deux étaient mineurs. L'avocat général Fleury observa que les dommages pouvaient aller à 1000 francs, pourtant qu'il n'y avait point de demande à fin de dommages-intérêts. Il est dit dans le rapport de la cause que le Sieur de la Fosse, père, était partie intervenante. Cet arrêt prouve que le mineur pouvait être seul mis en cause, ou que son père pouvait intervenir s'il le jugeait à propos ; et il n'intervenait qu'en qualité de père ; donc en cette qualité, il pouvait ester en l'instance. Merlin, dans son *Rép.*, t. 7, éd. in-8, au mot " Curateur," parlant de poursuites contre les mineurs qui " ont perdu leur père," observe : " Les procédures qui se font en justice contre

des mineurs non assistés de curateurs ne sont pas toujours regardées comme nulles." Il cite Papon et Bouchel. Il ajoute un peu plus loin qu'au petit criminel il n'y a pas besoin de curateur, lorsque l'affaire se poursuit par la voie de la plainte ; " mais, lorsque la réparation demandée est introduite par la voie civile, ou que l'affaire est *civilisée*, on exige alors un curateur (c'est-à-dire, au mineur qui a perdu son père). Cependant, il y a des tribunaux où ces sortes de causes se suivent sans curateur : *On n'en exige pas, par exemple, au Châtelet de Paris.*" Or, si dans une action de la nature de celle dont il s'agit, puisqu'elle tient en quelque sorte du délit, on n'exigeait pas de curateur au Châtelet de Paris, pourquoi en exigerions-nous ici, surtout, lorsque le mineur a encore son père pour le représenter? Il me semble que la jurisprudence du Châtelet de Paris doit encore avoir quelque force parmi nous. Que l'on remarque qu'il ne s'agit ici que d'une obligation que le mineur contracte par le droit naturel. Il ne s'agit pas de l'administration de biens qui ne lui appartiennent que par le droit civil. Son enfant naturel n'en est pas moins son fils, et n'en est pas moins le petit fils de l'ayeul, bien que cet enfant n'entre pas dans la famille *civile* de ses parents. Cela crée un intérêt suffisant, ce me semble, pour expliquer la jurisprudence des arrêts qui permettait d'appeler en cause le père du mineur séducteur, en cette qualité de père, pour répondre au nom de son fils mineur. Nous trouvons dans l'Ancien Denisart, au mot " Enfants," t. 2, p. 306, n° 16, un arrêt du 5 février 1762, qui confirme des sentences ordonnant que Mathurin Tonneau, comme *père* et *tuteur naturel* de son fils, âgé d'environ 23 ans (et par conséquent mineur sous la Coutume de Paris), serait contraint au paiement de 150 livres de provisions, adjugé à Jeanne Métrasse, fille *mineure* qui se disait grosse des faits de son fils. Le père, comme père et tuteur naturel de son fils, pouvait donc être assigné dans une instance de cette nature ; et la preuve que cet arrêt était conforme à la jurisprudence suivie en France jusque dans les derniers temps de l'ancien droit, c'est que Fournel, dans son *Traité de la séduction*, publié en 1781 (pp. 76 et 77), le cite comme consacrant cette jurisprudence. Il est vrai qu'il nous apprend que le motif de cette condamnation avait été la complaisance répréhensible avec laquelle Tonneau, père, avait souffert la fréquentation des jeunes gens. Mais, encore une fois, si, en présence d'un fait qui était de nature à porter le juge à refuser plutôt qu'à déférer la tutelle au père, ce père pouvait représenter son fils en justice, dans une action analogue à celle dont il s'agit, c'est donc parce que, dans une pareille action, la qualité de père, seule, suffisait, autrement cette jurisprudence que Fournel dit être appuyée sur une " quantité d'arrêts " serait inintelligible. En effet, ne serait-il pas étrange que le père

coupable fût admis à représenter son fils, tandis que le père non coupable serait inhabile à le faire ? Un tuteur *ad hoc* pour répondre à l'action n'aurait pas eu qualité pour autoriser le mariage du mineur. Le consentement du père eût été nécessaire. S'il y avait eu offre d'épouser, il aurait donc fallu qu'il intervînt. Or, en pareil cas, l'on suppose toujours qu'il y a eu promesse de mariage de la part du séducteur ; et le plus souvent il est de l'intérêt des familles que cette promesse soit exécutée, et que, par conséquent, lorsqu'un procès est commencé, ce procès se termine au plus tôt par une transaction de cette nature. D'un autre côté, si le mineur n'est point l'auteur de la grossesse de la fille qui l'en accuse, son père a un grand intérêt à ce qu'il ne soit pas à tort déclaré tel, car la légitimation de l'enfant naturel, par un mariage subséquent, ferait entrer cet enfant ainsi reconnu dans la famille civile et le rendrait habile à succéder. S'il est encore vrai que par le droit naturel, il peut y avoir des circonstances où, selon la discrétion du juge, l'ayeul est admis à demander des aliments à l'enfant naturel de son fils, et *vice versa*, l'on doit voir de suite que le père du séducteur mineur, est, par cette qualité même, la personne la plus propre et la plus intéressée à ester en justice pour son fils, dans une action portée contre ce dernier en déclaration de paternité.

AYLWIN, Justice : This action is brought against both the father and his minor son, aged about eighteen, as joint Defendants. The father is not sued *nomine tutoris*, his liability is made to rest upon the allegation : 1° That the Defendant, George Melvin Emerick, was under the power and authority of his father, *sous puissance paternelle* ; 2° That the father is bound to furnish the necessary means to maintain the illegitimate child of his son ; 3° That he was bound " to have care for the mental and religious training of his minor son, so that he should not have been guilty of the acts hereinbefore complained of, and that Henry Emerick, having neglected his duties as to his minor son, is by law bound and responsible for all the damages hereinbefore complained of, as having been done and committed by his minor son, George Melvin Emerick." The conclusions are " that George Melvin Emerick, " be declared the father of the child of Isabella M. Hislop, " and that Henry Emerick, individually, and as the natural " guardian of George Melvin Emerick, be condemned to pay " and satisfy to Plaintiff, in his said capacity, the sum of " £500 currency, as and for damages and lying in expenses " incurred as aforesaid, and for the support of the child." No service of process appears to have been made upon the minor; the father has alone pleaded to the action, no issue has been taken with the minor, no leave asked or granted to proceed

ex parte against him, and all that has been done in relation to him, has been to interrogate him upon *faits et articles*. He has appeared and denied positively, upon oath, having had any connection with the Plaintiff's daughter. To the 12th interrogatory: "Is it not true that, on or about the 27th June, 1852, you spent the evening at Plaintiff's House, in company with Isabella, in her father's kitchen;" he answers: "On one occasion, I do not recollect whether in June or July, I went there for shelter from the rain." To the 13th: "Is it not true that you spent the evening, or part of the evening just mentioned with Isabella, in her father's kitchen;" he says: "I sat in the kitchen, on the occasion referred to, in my answer to the last interrogatory." To the 14th interrogatory: "Is it not true that you had then and there, upon a sopha which was then in the kitchen, carnal intercourse and connection with her?" he swears: "*No, it is not true.*" The minor is proved to have been a boy going to school at this time, aged seventeen, the girl to have been upwards of a year older than he. On the 19th November, 1852, by an affidavit filed by Plaintiff it appears that the girl, with a view to have the minor arrested, declared that she was pregnant, "that she has been with child by the said George ever since the evening of the 27 June last." The child was born the 15th January, 1853; and it has been attempted to prove a seven month's birth, but the witnesses, not excepting a medical man, do not seem to me to profess or shew such experience as to entitle their opinion to any great weight on such a delicate and difficult point of medical jurisprudence. The house of Plaintiff is composed of three apartments, one occupied by the grand father and grand mother, exclusively, another as the common room of the house, and the third as the kitchen, the family are thirteen in number, besides two men farm labourers. There is no evidence of *fréquentation*, no proof that the minor ever visited the house, no proof of access, and the only evidence is the declaration of the girl, and proof by one witness that the minor had boasted to him that he had connection with her; the other conversations are not reliable as evidence even against a *majeur*. To my mind the case has not been made out against the minor, and I think that the plea of the father that the child was not that of his minor son, but the offspring of some other man, is better sustained by the circumstances of the case. However this may be, as the case presents itself, it may, and will, be disposed of upon other grounds. Emerick, the son, is younger than Plaintiff's daughter, as has been already said there is no proof of *fréquentation*, and there is a total absence of evidence to shew that Emerick, the father, neglected any precaution which a parent might

take to prohibit any association or intimacy between them, or to suspect the existence of such. The main allegation upon which the father's liability is made to depend is wholly unsupported. It would only be in a glaring instance of parental neglect, amounting to positive connivence, or, if such a thing be possible of direct encouragement of the profligacy of a son, that in France, a father would be held liable personally in a case of seduction. To impose such a liability upon the father of a boy at school is impossible. In the present case, liability might be more justly charged against the father of the girl, for acccording to her own statement, her sin was committed under her father's roof, most daringly, seeing the number of the inmates of so small a house and shamelessly, as there is no proof that young Emerick had ever set foot in the house before. Personal liability on the part of the father is at once repelled by the facts of the case. But the *conclusions* are directed against him also as *tuteur naturel*, though no liability in a representative character is alleged in the declaration. If, however, we take up these *conclusions*, we find them mainly and solely aimed at the minor, that he be declared the father. Since, Plaintiff has thought fit to make the son a party Defendant, and to conclude specially against him upon the main point, the *déclaration de paternité*, he cannot discontinue the suit, *quoad* the son, and obtain judgment against the father to declare the *paternité*, of the suppose illegitimate grand child, as against him. The conclusions as taken do not admit of this, and the court cannot extend or go beyond them. If then no judgment *en déclaration de paternité* can be given at all, not against the son, because no proceedings have been taken against him, and not against the father for want of conclusions, how can a judgment passed against the father as *tuteur naturel*, for "the sum of £500, as and for damages and lying expenses incurred as aforesaid, and for the support of the said child?" It is to be notice that the conclusions are severally against each of the Defendants, not joint and several, no *solidarité* is set up and no community in the judgment can exist between them, unless both be proceeded against together. The son must be put out of the cause at all events, how then can the father be condemned, in any manner, with the formula of conclusions adopted in this case? Whatever may have been the practice as to proceedings against minors, in France, without the election of tutors, I believe our local practice in Lower Canada to be the other way. Our Legislature has even thought it necessary expressly to give the minor authority to sue in his own name, and then only for the recovery of his *salaire*. With reference again to the liability of fathers, in general, under the old law of France, care must be taken to notice the

change which necessarily occurred here upon the introduction of the criminal law of England. The *puissance paternelle* as supported and inforced by the public law of France, even to the extent of actual emprisonment and direct coercition of the son, the proceeding for seduction, and *en déclaration de paternité*, were quasi criminal, and certainly exceptions to the usual *procédure* is purely civil cases. *Dans nos mœurs*, I consider the declaration in this case to be a dangerous innovation and I concur fully in opinion with the majority of the judges in the court below, who dismissed the action. The judgment of this court is founded upon the particular facts of the case, however, and asserts no general or abstract principle.

DUVAL, Juge : La présente action est portée contre le père individuellement, et comme tuteur naturel de son fils, pour un délit commis par ce dernier. Le père est-il responsable en son nom personnel ? Je n'éprouve aucune difficulté à résoudre cette question, dans une cause où l'on a ni allégué ni prouvé aucune participation de la part du père. La règle sur cette matière est clairement énoncée par les auteurs qui l'ont traitée. (1)

Au reproche fait au Défendeur de n'avoir pas veillé sur son fils, ne peut-il pas faire au Demandeur le même reproche de n'avoir pas veillé sur sa fille, dans sa propre maison, et lui répondre qu'il est également responsable sinon davantage du malheur qui est arrivé. Quant au fils qui est mineur, la question est de savoir si le père a qualité pour le représenter. On trouve dans tous les auteurs que le père ne peut représenter son fils en justice. (2) Mais il y des arrêts que l'on ne doit pas prendre comme autorités au soutien de la présente action. L'Ancien Denisart, vbo *Enfant*, p. 306, en rapporte un qu'on a cité, je ne trouve en France rien de semblable excepté dans les poursuites criminelles auxquelles on joignait le recours civil. Le père peut avoir intérêt à être partie en cause, mais il ne s'ensuit pas qu'il puisse représenter son fils comme tuteur naturel.

CARON, Juge : Le jugement est fondé et en fait et en droit, quant au père, si il était tenu en droit des dommages qui seraient résultés de la séduction de la fille du Demandeur par son fils mineur, ce qui n'est pas le cas, je ne trouverais pas dans la preuve suffisamment pour établir la paternité de l'enfant dans la personne du mineur. Le fait ne peut pas avoir été commis dans la maison, d'après la division et le nombre de personnes qui l'habitent, et il n'y a pas, d'après moi, de preuve que la chose se soit accomplie ailleurs. Les admissions et les aveux faits par

(1) Pothier, *Oblig*, n° 454 ; 1 Duparc Poulain, 215 ; Arrêts de Basset, p. 281 ; Fournel, 131.

(2) 2 Toullier, n° 1092 ; Merlin, *Répert*, in-8o, tome 26, p. 74, tome 20, 206 ; 1 Fréminville, n° 11 et 330 ; 7 Merlin, p. 19, col. 2.

le mineur sont de son âge, et sont sans importance. Ainsi, quant à lui-même, s'il était régulièrement dans la cause, je doute fort que la preuve fût de nature à le faire condamner comme père. Ainsi, quant au père et quant au fils, d'après la preuve, l'action est bien renvoyée. Même en droit, le jugement est bien fondé lorsqu'il dit : 1° que le père n'est pas tenu des suites de la séduction par son fils mineur, et ; 2° que le fils aurait dû être représenté. L'Appelant a paru admettre que, de droit commun, et dans les cas ordinaires, le père n'est pas responsable des suites de la séduction faite par son fils mineur. Mais il a prétendu que dans l'espèce, le père avait assumé cette responsabilité en prenant la défense de son fils. C'est pour établir cette exception à la règle générale qu'il a cité Merlin, *Rép.*, vbo *Puissance paternelle*, sec. 3, p. 3. Il est inutile de commenter sur cette autorité, qui n'est nullement applicable, puisque l'on a vu que, de fait, le père n'a pas plaidé pour son fils, et n'a pas pris sa défense. Sourdat est contre lui sur la thèse générale, Meslé aussi ; (voir ces autorités). (1) Le père n'était donc pas tenu à l'égard du Demandeur, quand même il aurait été prouvé que son fils lui avait causé des dommages dont il se plaint. Quant au fils, il aurait dû être représenté dans la cause, le père n'a pas fait disparaître ce défaut, le fils ne pouvait rien faire et n'a rien fait à cet effet. Le jugement doit être confirmé.

JUDGMENT : " THE COURT, seeing that Appellant impleaded Respondents jointly, and that Henry Emerick and George Melvin Emerick were both made the parties Defendant in the court below, *chacun en droit soi ;* that Respondents appeared in the court below, and that Henry Emerick alone pleaded to the action ; seeing that no proceedings were taken by Appellant to compel George Melvin Emerick to plead or take issue in the cause, and that the evidence adduced by Appellant, in so far as respects George Melvin Emerick, is evidence improperly taken, *ex parte,* and does not bind him ; seeing that Appellant hath wholly failed to establish any liability on the part of Henry Emerick, for the acts or misdeed of George Melvin Emerick, if any by him committed in this behalf, and that, by impleading George Melvin Emerick, individually, and making him a party to the cause, Henry Emerick cannot be considered as representing his son, either as *tuteur naturel,* or otherwise, in the exercise of the *puissance paternelle ;* seeing that the *conclusions* by Appellant against Henry Emerick were taken both against him, individually, and in a supposed representative character, and that the same are not warranted by the evidence adduced

(1) Ancien Denisart, vbo *Enfant*, 306, n° 16, Arrêt 5 février 1752 ; Fournel, *Séduction*, 76, 77,

as against him individually, and that the joinder of George Melvin Emerick repels any condamnation against Henry Emerick in any representative character, if such he had; seeing, therefore, that in the judgment of the court below, from which the present appeal hath been brought, there is no error. (1) It is considered and adjudged that the said judgment be, and the same is hereby affirmed, with costs." (*P D. T. M.*, 106, et 9 *D. T, B. C.*, p. 203.)

RAPPORT DU SHERIF.—AMENDEMENT.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 3th May, 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief - Justice, AYLWIN, DUVAL and MONDELET, Justices.

MOLSON et al., Plaintiffs below, Appellants, *and* BURROUGHS, Defendant below, Respondent.

Jugé: Que dans l'espèce, la motion des Demandeurs pour qu'il fût permis au shérif d'amender son retour eût dû être accordée, en autant qu'une partie ne doit pas profiter, et l'autre souffrir, d'une erreur du shérif commise par inadvertance.

Il semble qu'il sera permis au shérif, sur sa propre demande, d'amender son retour.

This was an appeal from two interlocutory judgments rendered in the Superior Court, at Montreal, on the 30th April, 1858, and the 29th May following, the first dismissing Plain-

(1) Judgment of the Superior Court of the 18th October, 1854 : "THE COURT, considering that Plaintiff hath failed to establish, by evidence, any matter or thing by reason whereof Henry Emerick ought to be liable to pay to him damages for the grievances complained of, in manner and form as Plaintiff hath concluded against him ; and, further considering that George Melvin Emerick, son of Henry Emerick, is a minor and cannot, by law, be impleaded or called upon to answer in an action at law without being represented by a tutor or curator duly appointed : doth dismiss the action." Judgment rendered by Day and Mondelet, justices, Vanfelson, justice, dissenting. Here follow the remarks made by DAY, J. : This is an action of damages brought by the father of a young woman against a father and his minor son, by the latter of whom the young woman had been seduced, and against the son *en déclaration de paternité*. The action is brought against the father simply as being liable for the injury committed by his son, and the son is sued without the appointment of a curator or any one authorized to represent him. The court is against this form of action. A party is only liable for damage for seduction on the presumption that there has been a breach of promise of marriage, and this would not bind the father unless he had assented to it. And the son should not have been impleaded without the appointment of a tutor or curator to represent him. The general rule is that a demand cannot be made on a minor in a civil suit unrepresented, and all the exceptions, such as that established by our statute, in allowing a minor to sue for wages, are in favor of allowing a minor to implead another party. Action dismissed.

tiffs' motion, for permission to the sheriff, on affidavits filed, to amend his return to a writ of *saisie-gagerie;* the second rejecting Plaintiffs' motion to revise the interlocutory judgment first rendered. The nature of the amendment sought to be made was to indicate more clearly what part of the goods set forth in the *procès-verbal* of seizure had been seized on the premises originally leased, and what part in the premises to which the goods had been removed. The Defendant, on the 24th June, filed an *exception à la forme,* founded mainly on the insufficiency of the sheriff's return, alleging, as a reason in support of his exception that it did not appear by the sheriff's return, and the *procès-verbal* of seizure, that any goods were seized upon the premises indicated as those to which Defendant had removed his goods, and, hence, it did not appear that the seizure had been made according to the terms and exigency of the writ. On the 18th September following, the sheriff moved for permission to amend his return, by stating therein where the goods, furniture and effects were seized. This motion was afterwards rejected, upon the ground that the sheriff not being a party in the cause had no right to move in the matter, the court intimating that the proper course was for Plaintiffs to make the motion. The motion to revise the interlocutory judgment of the 30th April was rejected by Justice Smith, on the ground solely that he thought it better not to interfere with the judgment rendered by another judge, although he expressed himself satisfied the amendment should have been permitted. His Honor, the chief justice, stated that it was competent for the sheriff, by motion, or, in any case, by petition to pray to be allowed to amend his return.

" La cour, considérant que la motion des Demandeurs faite le vingt-quatre mars mil huit cent cinquante-huit, à l'effet de permettre au shérif de ce district d'amender son rapport en la manière y mentionnée, procédait valablement, et qu'elle aurait dû être accordée, les parties ne devant pas, d'un côté, souffrir, ni de l'autre, profiter d'une omission ou d'une erreur commise par inadvertance par le shérif; que, par conséquent, dans le jugement de la Cour Supérieure, siégeant à Montréal, du trente avril 1858, qui rejette la motion, il y a mal jugé, infirme le jugement; et cette cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, accorde la motion, et par suite, met au néant le jugement de la Cour Supérieure du vingt-neuf mai 1858 qui rejette la motion faite par les Demandeurs le 17 du même mois, pour faire reviser le jugement du trente avril 1858, laquelle dernière motion, sera, vu le présent jugement donnant aux Demandeurs le profit de la motion du 24 mars 1858, regardée comme non avenue. (9 *D. T. B. C.*, p. 217, et 3 *J.*, p. 220.)

ACTION EN GARANTIE.—PROCEDURE.

COUR DU BANC DE LA REINE, EN APPEL, Montréal, 4 mai 1859.

Présents : Sir L. H. LAFONTAINE, Baronnet, J.-en C., AYLWIN, J., DUVAL, J., et MEREDITH, J.

ARCHAMBAULT, Demandeur en cour inférieure, Appelant, et BUSBY, un des Défendeurs en cour inférieure, Intimée.

Jugé : Qu'une demande en garantie incidente ne doit pas être jugée avant la demande principale.

Que, lorsqu'une demande a été suspendue par ordre du tribunal, il n'y a pas lieu à la péremption d'instance.

Le jugement dont est appel a été rendu par la Cour Supérieure, à Montréal, le 23 septembre 1856. L'Appelant avait intenté une action contre un nommé Frappier, et, en conséquence de certaines allégations dans le plaidoyer de ce dernier, avait intenté une action en garantie contre l'Intimé et autres. La contestation fut liée sur cette demande en garantie, et, le 15 décembre 1852, le jugement suivant fut rendu : " The court, considering that the inscription of the said cause is premature, inasmuch as judgment cannot be rendered on the merits of Plaintiff's demand *en garantie* until the cause wherein he is Plaintiff, and Michel Frappier, in his declaration mentioned, is Defendant, hath been heard and adjudged, doth discharge the said cause from *délibéré.*" The Respondent, who was one of Defendants *en garantie*, moved that, for want of proceedings during three years, the action against him be declared *périmée*, and judgment awarding the benefit of the *péremption d'instance* rendered. This motion was granted, and this action dismissed by judgment rendered on the 23rd September, 1856. (1) An appeal was instituted from this judgment, upon which appeal the judgment in question was reversed : " La cour : 1° considérant que, tant que le jugement " interlocutoire du 15 décembre 1852, restait en vigueur, " l'instance sur l'action en garantie était suspendue, par ordre " de la cour, et non par le fait de l'Appelant, qui avait mis sa " cause en état d'être jugée, que, pendant cette suspension, il " ne pouvait y avoir lieu à la péremption d'instance ; 2° con- " sidérant, par conséquent, qu'en accordant le profit de la mo- " tion faite par Thomas J. G. Busby, l'un des Défendeurs, à " l'effet de faire déclarer périe l'instance sur l'action en garan- " tie, et débouter le Demandeur de sa dite action, et en décla- " rant en effet périe la dite instance, et en déboutant le Deman- " deur de sa dite action, le jugement dont est appel a mal jugé : " Infirme le jugement rendu le 23 septembre 1856, par la Cour

(1) Day, Smith and Mondelet, Justices.

" Supérieure siégeant à Montréal, avec dépens sur le présent " appel contre Thomas J. G. Busby ; et cette cour procédant " à rendre le jugement que la Cour Supérieure aurait dû " rendre, rejette la susdite motion, avec dépens." (9 *D. T. B. C.*, p. 219.

LORANGER, POMINVILLE and LORANGER, for Appellant.

M. MORRISON, for Respondent.

BILLET PROMISSOIRE.

COUR SUPÉRIEURE, Québec, 2 mai 1859.

Présent : STUART, A., Juge-Assistant.

COTÉ *vs.* LEMIEUX.

Jugé : 1° Qu'un billet promissoire ou cédule sous seing privé, daté un dimanche, et donné en paiement pour un cheval acheté le même jour, est nul et de nul effet, suivant les dispositions de la 45° George III, chap. 10e, et 18 Victoria, chap. 117. (1)

2° Qu'une cédule contenant la condition d'exécuter à une époque subséquente une obligation notariée pour le montant d'icelle, n'est pas proprement un billet promissoire, mais une obligation de faire une chose qui devait être le sujet de l'action, que pour cette raison, l'action doit être aussi déboutée. (2)

Cette action était portée pour le recouvrement de la somme de £25, étant le montant d'un billet promissoire fait par le Défendeur et un autre, comme suit : " St. Giles, 18 septembre 1858, Nous promettons solidairement et conjointement, de payer à Amable Côté, la somme de vingt-cinq " louis courant, pour une jument qu'il m'a vendue et " livrée, que nous promettons de payer à lui, ou à son " ordre, payable comme suit, savoir : en quatre ans, en " donnant 6 louis et cinq schellings courant, chaque année, au " premier septembre de chaque année ; et, de plus, nous promettons de faire une obligation jeudi prochain, et, à défaut " de ce faire, la dette sera échue." (Signé,) " Michelle, sa † " marque, Lemieux," " Louis, sa † marque, Lemieux," Témoins, " Robt. Martin," " Geo. Smyth." Le Défendeur plaida qu'il n'y avait eu aucune considération valable pour le billet, en autant que la jument qui avait été la considération, était à l'instant de sa vente et livraison atteinte de vices rédhibitoires, et que c'était par l'artifice et dol du Demandeur qu'il avait induit le Défendeur à acheter la dite jument, et que dans les

(1) V. *S. C.* de 1890, 53 Vic., ch. 33, s. 14, et art. 3498 *S. R. Q.*, et *S. R. B. C.*, ch. 23.

(2) V. *S. C.* de 1890, 53 Vict., ch. 33, s. 82.

huit jours après la vente et livraison, il l'avait ramené au Demandeur, et l'avait laissé dans son clos, où elle était encore quand l'action avait été instituée ; et concluait à ce que la vente fût déclarée nulle, et le billet en question aussi déclaré nul, faute de considération.

STUART, A, Justice : The circumstance which gave rise to the giving of this note was the sale of a mare, which took place on the 19th day of September last, being a Sunday ; and the note itself is dated on the same day, Sunday ; I am therefore of opinion that an action cannot be maintained upon it, under the provisions of 45 Geo. III, cap. 10. Upon reference to this statute, which seems, at first, only to refer to tavern-keepers and traders in merchandize, it will be seen nevertheless that its object was to prevent trading in general ; and this is more particularly shewn by the latter clause in the section which expressly excepts from the provisions of the act, the sale of the produce of the estate of minors, etc., at the church doors, in country parishes, on Sundays ; and this is the only exception which the act makes. And, even these sales permitted by this act, are set aside by the 18th Vict., cap. 117, as a desecration of the sabbath. The object of the legislature, therefore, it is perfectly evident, is to prevent all sales, or transactions of a commercial or trading nature, from taking place on the Sunday ; and it cannot be expected that where, as in this instance, a horse-dealer carries on his traffic by selling horses on Sunday, and receives payment by a note dated on the same day, he should be excepted or excluded from the operation of the law. Independently of the above consideration, I would have dismissed the action, inasmuch as the document in question is not a promissory note ; it contains a stipulation to go before a notary, and pass an obligation for the amount thereof. It is, therefore, a contract or an agreement, and should have been sued upon as such, and not as upon a promissory note. Action dismissed. (9 *D. T. B. C.*, p. 221.)

TASCHEREAU, DUVAL et TASCHEREAU, pour le Demandeur.

CASAULT et LANGLOIS, pour le Défendeur.

CONSTITUTION DE NOUVEAU PROCUREUR.

SUPERIOR COURT, Quebec, 7 April, 1859.

Before CHABOT, Justice.

SAUVAGEAU *vs.* ROBERTSON et al.

Jugé: Que dans le cas où il a été filé une suggestion du décès de l'un de plusieurs Défendeurs, une motion à l'effet de contraindre les autres Defendeurs à substituer un procureur aux lieu et place des procureurs de record, l'un desquels avait été élevé au banc, ne sera pas accordée avant qu'il ait été jugé sur telle suggestion. (1)

DESCHÈNE, for Plaintiff, moved that Defendants do substitute an attorney to Messrs. Stuart and Vannovous, on the ground that Mr. Stuart, having been elevated to the Bench, he could no longer act as the attorney of Defendants. VANNOVOUS, for Defendants, argued, that, inasmuch as there was a suggestion of the death of one of Defendants filed and of record, Plaintiff could not compel Defendants to substitute an attorney, until such suggestion was disposed of in some way or another, either by disputing the alleged decease of one of Defendants, or by causing him, if dead, to be represented in the cause.

CHABOT, Justice : The motion for substitution cannot be granted, so long as the suggestion of the death of one of Defendants remains of record, and undisposed of ; so long as it remains on the record, the court is bound to believe that one of the parties is dead, and this being the case, Plaintiff must cause the removal of the suggestion of his death, either by disputing the fact of his decease, or by causing him, if dead, to be represented in the cause, before he can compel a substitution of attorney. Motion rejected. (9 *D. T. B. C.*, p. 224.)

PLAMONDON and DESCHÈNE, for Plaintiff.

STUART and VANNOVOUS, for Defendants.

(1) V. art. 200 C. P. C.

VENTE.—VAISSEAU ENREGISTRE.

SUPERIOR COURT, Montreal, 28th February, 1859.

Before SMITH, Justice.

MORGAN *vs.* FORSYTH et al.

Jugé: Qu'une action pour effets vendus et livrés aux Défendeurs pour leur vapeur, sera renvoyée, nonobstant que le vaisseau soit enregistré aux noms des Défendeurs, s'il appert que les effets vendus (du bois de chauffage) ont été vendus à un individu qui exploitait le vaisseau pour son propre compte.

SMITH, Justice: This action is brought against Defendants, owners of the steamer *Aylmer*, to recover the value of certain firewood furnished to the steamer in 1856, and which was alleged to have been sold to Defendants, at their request, and for the use of their steamer. The Defendants have pleaded that the steamer was leased to one Humphrey, who was running her on his own account, and that the credit was not given to Defendants, but to Humphrey, whose note it is alleged was taken in settlement of the account. The Plaintiff filed a special answer, admitting he had taken a note from Humphrey, on being led to believe, by the misrepresentation of the parties on board, that he was the owner, that the note was not paid, and that he had not given up his claim against Defendants, as the real owner. There is no doubt that the wood was furnished by Plaintiff to the steamer, whilst she was under the management of one Lafleur, as captain. Humphrey, examined for Defendants, states, that he bought the steamer from Defendants, in May, 1856, giving his notes for the price, but taking no formal transfer, that he ran her on his own account, during the navigation season, and that Lafleur was in his employ; Lafleur, when examined for Plaintiff, says the same thing. A copy of the register is filed, from which it appears that, in May, 1856, Defendants were registered, as owners of the steamer, but this is not sufficient to sustain the present action, the credit having been given to Humphrey and his nominees, in charge of the steamer. (1)

JUDGMENT: "Considering that Plaintiff hath failed to "prove the allegations of his declaration, and that Defendants "ever contracted with Plaintiff, or in any way became liable "in law to pay to Plaintiff the price and value of the wood "sought to be recovered; the court doth dismiss the action." (9 *D. T: B. C.*, p. 225 et 3 *J.*, p, 98.)

POPHAM, for Plaintiff.

ABBOTT and BAKER, for Defendants.

(1) Addison, on Contracts, pp. 628-9.

JUGEMENT.

COUR SUPÉRIEURE, Québec, 2 mai 1859.

Présent : CHABOT, Juge.

HUOT *vs.* PAGÉ.

Jugé : Que lorsqu'un jugement final a été rendu dans une cause, la cour ne peut intervenir ensuite pour le changer ou le modifier en aucune manière, sur motion ou autrement. (1)

Le Défendeur offrit une confession de jugement, pour une somme moindre que la demande. Le Demandeur refusa d'accepter cette confession de jugement, et fit une demande de plaidoyer ; le Défendeur contesta le surplus de la demande seulement. Après contestation filée, le Demandeur s'y soumit, et demanda jugement contre le Défendeur suivant la confession de jugement, et jugement fut en conséquence rendu sur icelle.

LANGLOIS, pour le Défendeur, fit ensuite motion que le Demandeur fût condamné à payer au Défendeur les frais de la contestation, pour la raison que, par la contestation faite par le Demandeur, après la confession du jugement par le Défendeur, il avait fait encourir à ce dernier certains frais qui devaient retomber sur lui, en autant qu'il avait accepté la confession de jugement et avait demandé et obtenu jugement sur icelle ; et que, nonobstant que le jugement final était rendu, la cour pouvait accorder la présente application, en autant que la motion pour jugement, suivant la confession, n'était qu'une procédure incidente, et ne privait pas la cour du pouvoir d'imposer par le jugement telles conditions qu'elle trouverait convenables.

LANGEVIN, pour le Demandeur, maintint que la motion ne pouvait être accordée, par la raison que le jugement final avait été rendu dans la cause ; et qu'une fois que jugement final était rendu, la cour n'avait pas le droit de le changer et de le modifier ; que, si la motion était accordée, le jugement final qui avait été rendu, serait entièrement changé, et aurait l'effet en conséquence de détruire toute sécurité et confiance dans les décisions ou jugements des tribunaux.

CHABOT, Juge : La cour est d'opinion qu'une fois que le jugement final est rendu dans une cause, elle n'a pas le droit de le modifier ou changer d'aucune manière, ni sur motion ou autrement. Si aucune des parties se trouve lésée par un jugement final, la loi lui accorde un remède, et la cause est appelable ; et si, comme dans le présent cas, la cause est non

(1) V. art. 474 C. P. C.

appelable, les parties ont le droit de se faire entendre avant que jugement final soit rendu. Motion rejetée. (9 *D. T. B. C.*, p. 226.)

LANGEVIN, F. X., pour le Demandeur.

CASAULT et LANGLOIS, pour le Défendeur.

PROCES PAR JURY.—PROCEDURE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 4th May, 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL and MEREDITH, Justices.

WHYTE, Defendant below, Appellant, *and* NYE, Plaintiff below, Respondent.

Dans une action pour injures verbales le Demandeur, dans une exception filée par lui, déclara qu'il faisait option d'un procès par juré, l'exception fut renvoyée sur défense en droit, il ne fit aucune déclaration par son second plaidoyer, mais subséquemment il fit motion " qu'il lui soit " permis de renouveler sa déclaration qu'il demande un procès par " juré, et qu'il fait son choix à cet effet." Du jugement renvoyant cette motion le Défendeur interjeta appel :

Jugé : 1° Que la déclaration du choix fait par l'exception du Défendeur subsistait nonobstant le renvoi de telle exception, et donnait droit au Défendeur d'obtenir un procès par juré.

2° Que la motion telle que produite était de fait une motion pour *acte* qui ne pouvait affecter les droits du Demandeur, et eût dû être accordée. (1)

The Plaintiff's action was in damages for *injures verbales*, and Defendant pleaded an exception in which he declared his option of a trial by jury, also a *défense au fond en fait*, in which nothing was said as to the mode of trial. The Plaintiff filed a demurrer, or answer in law, to the exception, and, by judgment rendered by Justice Smith, on the 28th December, 1857, the answer in law was maintained, and the exception dismissed. On the 20th April, 1858, Defendant moved, inasmuch as the exception had been dismissed without reserving to Defendant his right to a jury trial, " that he be allowed to " renew his declaration that he desires a trial by jury, and " makes his option to that effect." Judgment was rendered on this motion by Justice Mondelet, on the 30th April, 1858, to the effect that Defendant." take nothing by his motion." From this interlocutory judgment, an appeal was instituted. The Respondent contended : 1° That the judgment on the demurrer not being before the court, the court could not inquire into the correctness of that judgment, in point of law, nor into

(1) V. art. 350 C. P. C.

the question whether it did or did not deprive Appellant of a jury trial ; 2° That the motion to renew the declaration of option already made was properly rejected, it being based on the assumption referred to, as to the effect and extend of a judgment rendered by another judge, the legality or ground of that judgment not being directly raised by that motion ; 3° That Appellant was bound to proceed with the case in such way as to raise directly before the inferior tribunal, and to get its direct adjudication on the point of his right to a jury trial, so that the Court of Appeals might have had before it a substantive judgment and not an indirect and implied conclusion, or inference such as the Appellant sought to sustain ; 4° That such a course was the more necessary, because Respondent was justified in treating the motion, as to renewed option, as unnecessary and therefore illegal, and as assuming the loss of a right not adjudicated upon ; 5° That Respondent would be deprived, by the proceedings of Appellant, of his right to desist from a judgment if given adversely to Appellant, directly adjudicating on the point of the right to a jury trial, in case he supposed the option validly made by the exception ; 6° That Appellant was not deprived of his right to a jury trial, if such right existed.

AYLWIN, Justice, rendered the judgment of the court, and said that Defendant's option for a jury trial subsisted, notwithstanding the dismissal of the plea ; and that the motion made was in effect a prayer for *acte* which could not prejudice the rights of Respondent, and ought to have been granted.

MEREDITH, Justice : It seems to me it would have been more regular for Appellant to have waited for his adversary to proceed, and if such proceeding tended to deprive him of a trial by jury, then he might have moved to reject it ; or Appellant might himself have made a motion for the issuing of a *venire*, or adopted some proceeding to raise the question as to his right to such trial. I do not think it necessary however to dissent from the judgment.

" THE COURT : Seeing that Appellant, who was Defendant in the court below, in and by his plea of exception duly declared his option to have and obtain a trial by jury of the issue between the parties ; seeing that although the plea of exception was overruled and set aside by the court below, yet the option so declared by Appellant, still subsisted unimpaired, and withdrew the decision of the fact from the court, and entitled Appellant to obtain the verdict of a jury ; seeing that the motion made by Appellant on the twentieth day of April, 1858, in the court below, that he be allowed to renew his declaration that he desired a trial by jury, was in fact a

motion for *arte* of his declaration which, *majori cautela*, he might lawfully make, and was one, which in no manner could prejudice the rights of Respondent, or injuriously affect his interests ; seeing that, therefore, in the judgment of the court below, by which the said motion was rejected, there is error, it is considered and adjudged that the judgment rendered in the Superior Court, at Montreal, on the thirtieth day of April, 1858, be, and the same is hereby reversed ; and, proceeding to render the judgment which the court below ought to have rendered, it is considered and adjudged, by the court, now here, that *acte* be and the same hereby is given to Appellant, of the renewal of his declaration that he desires a trial by jury, to serve and avail him to all legal intents and purposes." (9 *D. T. B. C.*, p. 228.)

ARMSTRONG, for Plaintiff below.

ROBERTSON, A. and G., for Respondent.

LAFLAMME, LAFLAMME and BARNARD, for Appellant.

PROCEDURE.—NOUVEAU PROCES.

SUPERIOR COURT, Quebec, 1st June, 1859.

Before CHABOT, Justice.

GIBB et al. *vs.* TILSTONE et al.

Jugé : Que, dans l'espèce, une demande pour un nouveau procès, fondée sur allégué d'erreur dans la direction donnée au jury, doit être rejetée.

This was an action on a promissory note, against Tilstone & Son, as makers, and Routh & Co., as endorsers, for the sum of £5327.67. Plea *payment*. The transaction which gave rise to the giving of the note was as follows : Tilstone & Son purchased from Plaintiffs two rafts of timber, in the month of October, 1857, for the sum of £6512 6 6 ; and agreed to pay therefor by two notes, namely, the one now sued upon, being their note, indorsed by Routh, for one fifth of the purchase money, payable on the 15th June, then next following; and, the second, being their note, without indorsation, for the balance, payable on th 5th July then next following. The timber was to remain with Plaintiffs as security, and the purchasers were to pay the wintering charges. The Defendants produced the three following receipts, signed by one McFarlane, the clerk of Plaintiffs, as proof of their plea. " Quebec, 2nd June, 1858. Received from W. H. Tilstone & Son, eighteen hundred and ninety-four dollars, thirteen cents, as above, being on account of their note due 15th instant. Gibb & Ross, per Duncan McFarlane."

" Quebec, 16th June, 1858. Received from W. H. Tilstone & Son, Messrs. Geo. B. Symes & Co's cheque for four thousand dollars on account of their note due 15, 18 instant. $4,000. Gibb & Ross, per Duncan McFarlane."

" $4110, 00, Quebec, 17th June, 1858. Received from W. H. Tilstone & Son, four thousand one hundred and ten dollars on account of their note, due 5, 8th July next. Gibb & Ross per Duncan McFarlane."

McFarlane, on cross-examination, stated, that the receipts in question were not written by him, nor in his presence, but were presented to him for signature by Charles Tilstone, one of Defendants, and were in his handwriting; and that, when he was sent by Plaintiffs for the money mentioned in the first receipt, he was instructed to receive from Tilstone & Son a sum of money equal to the price of 381 pieces of timber; that Charles Tilstone, on presenting the receipt to him, did not read it over to him, nor did he read it himself, but merely looked to see that the amount stated in it was correct, and that he did not observe the words," being on account of their note due 15th instant; " and that if he had observed these words in the receipt, he would not have signed it; that he had no authority or instructions from Plaintiffs regarding this note, and there was no mention made of it. That, with respect to the second receipt, he signed it under the following circumstances: Charles Tilstone applied to Plaintiffs, on the 15th June, for a specification of timber shipped on board the *Egyptian*, which Ross, one of Plaintiffs, was unwilling to give, but ultimately consented, upon Tilstone promissing to bring over the money for the timber at one or two o'clock in the afternoon, the specification amounted to £1070 0 0; that, as soon as Tilstone left Plaintiffs' office, Ross instructed the witness, if the money were not brought at the time appointed, to go to Tilstone's office and ask for it; that the money was not paid at the time appointed, and Ross again requested him to go and ask for it; that he called at Tilstone & Son's office at least twice during that day, but received the money from them, and, on the following day, the 16th June, after calling several times, he, at last, obtained $4000 from them, which, as he understood, was to represent the timber shipped on board the *Egyptian*, and that, upon this occasion a receipt for the amount (being receipt n° 2,) was written out ready, in the handwriting of Charles Tilstone, and his attention was not drawn to that part of the receipt containing the words," on account of their note due 15, 18th instant," and that, if he had observed these words, he would not have signed the receipt; that he had no instructions from Plaintiffs to sign this receipt, nor did Tilstone make any mention of the

note due on the 15, 18th June, referred to in the receipt. With regard to receipt n° 3, his instructions from Plaintiffs were to receive from Tilstone & Son the money for the specification of timber delivered to the "Tay," without any particular instructions; that he did not inform Plaintiffs of the nature of the receipts of the 16th and 17th June, the two former receipts; that, after he had signed this third receipt, Tilstone handed him a bank notice which they, Tilstone and Son, had received, requiring payment of the note falling due on the 15th and 18th June, the note sued upon; and desired him to have it withdrawn; that they did no shew him this bank notice on the 16th June, when they paid him the $4000, nor was anything then said about the notice or the note; that he then took the notice to Ross, one of Plaintiffs; that he was unconscious that the third or last receipt expressed that it was," on account of their note due 5, 8th July next;" that he looked upon all these three receipts as general receipts when he signed them, and on account of the timber which had been delivered on each occasion, and that he would have refused to sign them if he had read them, because he had no authority respecting them; and that, when monies are paid on account of notes, it is not usual to give receipts, but to endorse the partial payment on the note. The question at issue, and which was submitted to the jury, therefore, was: Did Defendants, Tilstone & Son, pay to Plaintiffs, before the institution of the action, the amount thereby demanded? BOWEN, Chief Justice: After argument of counsel, charged the jury, and a verdict in the negative was rendered.

IRVINE, for Defendants, now moved for a new trial, on the ground of alleged misdirection, the Chief-Justice having charged the jury, that, in deciding upon the appropriation of the payments, they must keep in view the agreement of the parties, and their mutual intention as shewn by their conduct, and all the accompanying circumstances, and, as one of the circumstances which they were so to keep in view, he told them that, "Plaintiffs held the indorsed note sued upon as security to meet any fluctuation in the timber market," whereas there was no evidence whatever that the note was held for that purpose but that, on the contrary, the contract between parties shewed that the note was given in payment of the first instalment of the price of the timber; and because His Honor refused to instruct the jury that a debtor in making a payment to his creditor, has the right to impute the payment to the debt which he has most interest in discharging (1) and that Tilstone & Son's imputation of

(1) Pothier, *Obligations*, Nos 565 to 567.

the payments they made was perfectly clear by the receipts they had written, in which they imputed the two first payments to the discharge of the note now sued upon. But that, even if Tilstone & Son had not imputed the payments as they had done by the receipts, in such case, the law would impute the payments to the liquidation of the most onerous debt, or the debt which the Defendants has most interest in discharging, or the debt which was first to become due (1); and that Tilstone & Son, had most interest in discharging the note sued upon, inasmuch as it was indorsed, or bore the name of a surety. That His Honor misdirected the jury in charging them, that the Defendants had more interest in discharging the note payable on the 5th July, inasmuch as it bore interest, and was therefore more onerous, than in liquidating the note sued upon which did note bear interest; whereas, by the contract between the parties, it appeared that both notes bore interest. That Defendant, Routh, having indorsed the note as security for the fulfilment, by Tilstone & Son, of their contract with Plaintiffs, could allege in defence to an action against him on the note, all the circumstances which an ordinary surety could avail himself of; and that no agreement between Tilstone & Son, and Plaintiffs in the absence of Routh, could in any way affect his rights or interest; that if Plaintiffs agreed with Tilstone & Son, to give them the timber upon their paying for it, instead of imputing the payment to the liquidation of the note upon which Routh was liable as indorser, such agreement could not prejudice him in consequence of his not having been informed of it, or made a party to such subsequent agreement, that Plaintiffs, if they were desirous of holding Routh liable to them on the note should not have given up the timber to Tilstone & Son, as, by that means, they had deprived Routh of his right to be placed in their position, and hold the timber as security for his liability as the surety of Tilstone & Son; that, before they could call upon Routh, as surety of Tilstone & Son, Plaintiffs must be enabled to substitute him in all their rights and interest, and put him in possession of the timber (2); that, having placed it out of their power to do this, by delivering the timber to Tilstone & Son, they must be considered as having liberated Routh.

VANNOVOUS, for Plaintiffs, contended that the charge to the jury was perfectly legal and proper, in directing them that the indorsation of the note, by Routh, was to meet any fluctuation which might take place in the value of the timber

(1) Pothier, *Obligations*, Nos 566, 567; 4 Marcadé, p. 554, s. 726.

(2) Pothier, *Obligations*, No 427; Chitty, on Contracts, p. 471, notes.

before the completion of the contract; and that upon no other supposition, could Routh's indorsation be accounted for, inasmuch as by the contract between the parties, Plaintiffs were to retain possession of the timber until paid for; that this circumstance clearly indicated the estimation which Plantiffs entertained of the purchasers, Tilstone & Son, inasmuch as, in addition to retaining the timber until paid for, they insisted upon the receipt of an indorsed note, to meet any fluctuation in the value of the timber, and this was the only security they had to rely upon in the event of timber falling in value, and Tistone & Son refusing to complete their contract to take all the timber. That the imputation of the payments made was to be gathered from the circumstances of the parties to the contract; that, by the agreement between the parties the payments were to be made for the timber, and the clerk, MacFarlane, even supposing he had read the receipts, had no power to consent to any appropriation of the payments, but he distinctly denied that he ever consented to any imputation of payment upon the note, and therefore, if a mere oversight by a clerk were allowed to operate as an imputation of payment, it would allow Defendants to perpetrate gross frauds. That there was another remarkable fact as bearing upon this point, and it was this, that when Tilstone & Son paid the £1000, on the 16th June, which was the second payment, and wrote out a receipt, " on account of note due on the 15, 18th instant," this payment, together with the former one pretended to have been made on the same note, exceeded the amount of the note by about £100. There was another fact also, the indorsed note, now sued upon, was in the bank at the time these payments were made, and the other note was still in the possession of Plaintiffs, and if Tilstone & Son wanted to pay the first note, they ought to have paid it at the bank, and not to Plaintiffs, who held the other note. That it was not competent for Defendants, Tilstone & Son, to argue that Plaintiff shaving given up the timber, relieved the other Defendant, Routh, inasmuch as it had not been pleaded, and was not therefore put in issue in the cause; besides Routh was not a surety, but a principal debtor upon the promissory note.

STUART, Q. C., Counsel for Plaintiffs, opposed the rule, and said that the question submitted to the jury was simply one of fact, as to whether Tilstone & Son had paid on account of the note, or on account of the timber, and they had correctly found that they had not paid on the note, but on the timber; and Plaintiffs were therefore entitled to judgment pursuant to their motion to that effect. That the argument of Defendants' counsel, respecting a supposed new or subsequent contract between Tilstone & Son, and Plaintiffs, to the prejudice of the

other Defendant Routh, was entirely without fondation, for the simple reason, that no new contract took place between them, Plaintiffs, merely, through a spirit of liberality, allowing Tilstone & Son to take away the timber in portions, according as they had the means to pay for the quantity they took away, instead of insisting, as they might have done, upon retaining all the timber, until Tilstone & Son had the means to pay for the whole of it in one sum, and the question therefore submitted to the jury was simply, as to whether the payments made by Tilstone & Son were for these portions of timber, or upon the note now sued upon; and, as the evidenee established they were made upon the timber so delivered, the jury had correctly found a verdict in accordance with the evidence; and the present motion of Defendants for a new trial, must therefore be rejected.

CHABOT, Juge : Il n'est pas nécessaire d'entrer dans la question d'imputation soulevée par les Défendeurs. La cour est d'opinion que cette question ne s'élève pas ici; parce que, il a été prouvé, et par les témoignages et par les circonstances, et le jury en est venu à la conclusion, que les Demandeurs n'avaient jamais eu l'intention d'accepter les paiements faits par Tilstone et Fils, sur le billet endossé, mais à compte de l'autre billet qui n'avait pas d'endosseur, ceci est clairement prouvé par MacFarlane lui-même, qui dit que s'il avait connu la nature des reçus il ne les aurait pas signés; la cour croit le témoignage de ce témoin. En outre, il n'est pas croyable que Tilstone et Fils, hommes d'affaires, voulussent volontairement payer, ou que les Demandeurs, aussi hommes d'affaires, pussent s'attendre d'être payés d'un billet qui n'était pas encore échu. La question alors que le jury avait à décider était simplement une question de fait, et il a fait rapport que Tilstone et Fils n'étaient pas fondés à prétendre qu'ils avaient fait les paiements sur le billet endossé; mais que, de fait, les paiements faits par eux avaient été faits à compte de l'autre billet qui n'était pas endossé. La charge du juge qui a présidé au procès est conséquemment correcte, et pour aucune des raisons mentionnées dans la motion des Défendeurs, ont-ils droit à un nouveau procès.

JUGEMENT : " La cour ayant entendu les parties sur la règle obtenue le quatrième jour d'avril dernier, par les Défendeurs William Henry Tilstone et Charles Henry Elridge Tilstone, tendant à faire mettre de côté le verdict du jury rendu en cette cause le vingt six-mars dernier, et à faire ordonner un nouveau procès, pour les raisons y mentionnées, ayant examiné la procédure, les pièces et preuves au dossier, considérant que les raisons alléguées par les Défendeurs en leur règle ne sont fondées ni en loi ni en fait; considérant

que les jurés ont, par leur verdict, rapporté et prononcé sur la question de fait à eux soumise parla cour, renvoie la règle."

"La cour, ayant entendu les parties sur la règle obtenue le quatrième jour d'avril dernier, par le Défendeur, Havilland Lemesurier Routh, tendant à faire mettre de côté le verdict du jury rendu en cette cause le vingt-six mars dernier, et à faire ordonner un nouveau procès pour les raisons y mentionnées, ayant examiné la procédure, les pièces preuves au dossier, considérant que les raisons alléguées par le Défendeur en sa règle ne sont fondées ni en loi ni en fait, considérant que les jurés ont par leur verdict, rapporté et prononcé sur la question de fait à eux soumise par la cour renvoie la dite règle." (9 *D. T. B. C.*, p. 244.)

VANNOVOUS, for Plaintiffs.

STUART, Q. C., Counsel.

HOLT and IRVINE, for Defendants.

IMPUTATION DE PAIEMENTS.—NOUVEAU PROCES.

QUEEN'S BENCH, IN APPEAL, Quebec, 19th June, 1860.

Coram Sir L. H. LAFONTAINE, Bart. C. J., AYLWIN, J., DUVAL, J., MONDELET (C.), A. J., BADGLEY J., ad hoc.

TILSTONE et al. (Defendants in court below), Appellants, and GIBB et al. (Plaintiffs in the court below), Respondents.

Held: That, on an appeal from the judgment of the Superior Court rejecting the Defendant's motion for a new trial and entering up judgment for Plaintiffs on the verdict of a jury, the court will set aside the verdict, and dismiss Plaintiff's action, *non obstante veredicto*, where they consider, that, according to law and the evidence adduced at the trial, the verdict ought to have been for Defendants.

This was an appeal from a judgment rendered by the Superior Court, at Quebec, on the 1st of June, 1859, rejecting Defendants' motion for a new trial, and entering up judgment on the verdict of the jury, condemning Defendants to pay Plaintiffs the sum of $5329 72, and interest and costs which is reported *suprà* p. 211.

The following was the judgment rendered by the Court of Appeals, Mr. Justice DUVAL dissenting: "La cour, considérant que les deux billets mentionnés dans cette instance comme ayant été consentis par William Henry et Charles Henry Eldridge Tilstone, sous les noms et raison de W. H. Tilstone & Son, le premier en date, celui qui devenait dû le 15 juin 1858, et qui fait l'objet de la présente action, est celui sur lequel les premiers paiements faits par les dits deux débiteurs

doivent être imputés, comme ils l'ont été en effet par les reçus qui constatent ces paiements; d'abord,parce que le dit billet était le premier qui devenait dû; ensuite, parce que le paiement en était garanti par un endosseur, et, enfin, parce que, dans les circonstances, les débiteurs étaient bien fondés à faire, en payant, l'imputation qu'ils ont faite.

Considérant, en outre, que, dans l'espèce, la dite imputation portée aux susdits reçus, qui sont signés par le commis des Demandeurs, lie ces derniers, et est, du reste, l'imputation que la loi faisait elle-même en pareil cas.

Considérant, par conséquent, que le susdit premier billet, échu le 15 juin 1858, est payé, et que, dans le jugement dont est appel, il y a mal jugé, infirme le jugement, rendu le 1er juin 1859, par la Cour Supérieure siégeant à Québec, et cette cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, déboute les dits Intimés de leur action. (4 *J.*, p. 361.)

HOLT et IRVINE, for Appellants.
BETHUNE et DUNKIN, Counsel.
F. C. VANNOVOUS, for Respondents.
O'KILL STUART, Counsel.

NOVATION.

SUPERIOR COURT, Quebec, 2nd May, 1859.

Before Stuart, Asst.-Judge.

Brown *vs.* Mailloux et al.

Jugé : 1° Que pour opérer novation, il faut qu'il y ait une différence entre le nouveau et l'ancien contrat; et qu'un billet promissoire n'opérera pas novation d'un autre billet précédemment donné. (1)

2° Que le témoignage de l'un de plusieurs Défendeurs, quoiqu'il soit insolvable, est inadmissible pour établir qu'il avait subséquemment donné un billet en paiement de celui sur lequel l'action était intentée, et ce par la raison qu'il est partie à l'action. (2)

This was an action against several Defendants on a promissory note. Plea: That Garneau, one of Defendants, at the solicitation of Plaintiff, had subsequently given him another note in payment of the note sued upon; as Plaintiff told him that, if he had another note, omitting the name of Mailloux, one of Defendants, and who was insolvent, he would be the better enabled to get this note discounted; and that Plaintiff, then and there, promised and agreed to return the original

(1) V. art. 1169 C. C.

(2) V. art. 251 et 252 C. P. C.

note sued upon; but that, on the contrary, he never did return said note, but always afterwards refused to do so. For Defendants, it was contended that the new note operated as a novation of the one sued upon, which was given by Defendant Garneau, in payment thereof, as was proved by Garneau's clerk, and, by the evidence of Garneau himself. For Plaintiff, it was argued, that, even if the second note had been given in payment of the one sued upon, it would not operate as a novation, as, in order to constitute a novation, it was necessary that there should be some difference between the nature of the new debt, and the one sought to be novated; but that, in point of fact, it was not given in payment of the note sued upon, but only as a collateral security for the payment of the debt for which the note sued upon was given.

STUART, Asst.-Judge: Two questions are submitted for decision in the present cause: 1° is the defence of novation made out; 2° can Garneau, one of Defendants, be examined as a witness? The facts are the following: a note was made by Mailloux, one of the Defendants, in favor of Garneau, the other Defendant, for £100, and by the latter indorsed to Plaintiff; at maturity, this note was protested for non-payment; after the protest, Garneau gave his note for the same sum to Plaintiff, which note is produced in the cause, and was never made use of. Both Defendants, in separate pleas, but in the same language, pleaded that these facts amount to novation, and ask for the dismissal of the present action. Two witnesses were examined by the Defendant Garneau and his clerk, the latter proves nothing, beyond the making of the second note, the former swears that Plaintiff was to have delivered up to him the note sued upon; admitting these facts, is there novation? The court thinks not. Pothier says (1): "Quoiqu'il soit expressément déclaré par l'*acte* qui contient le *nouvel engagement* que les parties *entendent faire novation, il faut*, pour que la *novation soit valable*, que cet acte *contienne quelque chose de différent de la première obligation* qui a été contractée." Upon the facts as sworn to by Garneau, the first note was to be handed to him, that done, he would have become the holder, and Mailloux would be liable to him, there is no novation. Upon the second question, the court is of opinion that Garneau is incompetent because he is a party to the issue, and therefore interested. It is to be borne in mind that the pleas are in bar to the whole action. If, therefore, Garneau, by his testimony, has proved Mailloux's plea, the present action must be dismissed as to both Defendants. The general rule is that a party to the record can is no case be examined

(1) Pothier, *Obligations*, n° 596; Contrat de change, n° 189.

as a witness. Judgment against Defendants, jointly and severally, for the amount claimed. (9 *D. T. B. C.*, p. 252.)

PENTLAND and PENTLAND, for Plaintiff.

CHAMBERS, for Defendant Garneau.

BOSSÉ, for Defendant Mailloux.

PRESCRIPTION.—AVIS D'ACTION.

SUPERIOR COURT, Québec, 2 mai 1859.

Before CHABOT, Justice.

LAVOIE *vs.* GRÉGOIRE.

Jugé : 1° Qu'une action contre un juge de paix, pour faux emprisonnement, doit être, sous les dispositions des 14e et 15e, Vic., cap. 54, s. 8, commencée dans les six mois en suivant l'acte qui a donné lieu à l'action.

2° Que l'avis d'action requis par la deuxième section du dit statut, n'est pas un commencement d'action, il faut que le writ émane. (1)

The action was in damages against Defendant, a justice of the peace, for having illegally issued his warrant for the emprisonment of Plaintiff, for an offence committed against the 13th and 14th Vic., cap. 40. The Defendant demurred to the action, on the ground that it appeared, by the declaration, that the emprisonment complained of took place on the 13th May, and the writ of summons was dated on the 13th December, 1858; and that, consequently, the action could not be maintained, inasmuch as more than six months had elapsed after the imprisonment complained of, and before the action was brought, under the provisions of the 14th and 15th Vic., cap. 54, sec 8.

CARON, L. B., for Plaintiff, argued that the notice required by the second section of the above act, had been duly served upon Defendant, within the six months after the commission of the emprisonment complained of, and that this must and ought to be considered the commencement of the action; and that the issuing of the writ was merely a following up of the proceeding originated by the notice.

BORLASE, for Defendant, maintained that the terms of the statute were clear, and that it was necessary to serve the writ or proces of the court in order to bring the suit within the terms of the statute, which required the action to be commenced within the six months after the commission of the act complained of.

(1) V. art 22 C. P. C. et art. 2261 C. C.

CHABOT, Justice: The demurrer must be maintained. By the second section of the statute, notice of the intended suit is required to be served upon justices of the peace, in actions of this nature, one month before the bringing of such suit; and the eighth section requires the action to be commenced within six months after the act complained of. Now, in this case, the notice required was duly served, and was also served within the six months after the act complained of, but this is not a commencement of the action, the writ or process of the court must issue in order to constitute a commencement of the action, so as to bring it within the terms of the eighth section of the statute. Action dismissed. (9 *D. T. B. C.*, p. 255.)

CARON, L. B., for Plaintiff.

ROSS and BORLASE, for Defendant.

PROCEDURE.—TIERS-SAISIE.—CONTESTATION.

MONTRÉAL, 31 octobre 1857.

Coram SMITH, J., C. MONDELET, J., BADGLEY, J.

MONTRÉAL, 28 novembre 1857.

Coram C. MONDELET, J.

LYNCH *vs.* MCLENAN et al., *et* LA BANQUE DU HAUT-CANADA, Tiers-Saisie.

Jugé: Que pour être admis à contester la déclaration d'un Tiers-Saisi après l'expiration du délai fixé par la règle de pratique, il faut montrer cause suffisante pourquoi la contestation n'a pas eu lieu dans le délai. (1)

La déclaration de la Banque du Haut-Canada, tiers-saisie, avait été faite le 31 juillet 1857. Le 17 octobre 1857, le Demandeur demanda, par requête, qu'il fût admis à contester la déclaration de la Tiers-Saisie, nonobstant l'expiration du délai fixé par la règle de pratique, appuyant sa demande d'un affidavit dans lequel le Demandeur alléguait qu'il n'avait pu recueillir les informations nécessaires pour contester que difficilement et depuis l'expiration du délai, savoir, tout récemment, et qu'il était exposé à souffrir des dommages s'il n'était pas admis à contester. La cour trouva ces motifs insuffisants et renvoya la requête, par jugement du 31 octobre 1857. Le 17 novembre 1857, le Demandeur renouvela sa requête qu'il appuya d'un nouvel affidavit, dans lequel il alléguait que, jusqu'au 29 septembre précédent (1857), il n'avait pu obtenir les informations nécessaires pour entreprendre une contestation dispendieuse;

(1) V. art. 626 C. P. C.

qu'il lui avait fallu communiquer avec les officiers du gouvernement, à Toronto, et que ce n'est qu'après avoir reçu du receveur général, une lettre datée du 25 septembre 1857, qu'il avait pu entreprendre cette contestation; que d'après cette lettre, la Tiers-Saisie devait avoir en main, appartenant aux Défendeurs, une somme de £579. 14s. 2d. et que, si le Demandeur n'était pas relevé du défaut de n'avoir pas contesté dans les délais, il était exposé à perdre sa créance. La cour trouva ces raisons suffisantes et admit le Demandeur à contester, par jugement du 28 novembre 1857. (3 *J.*, p. 114.)

DOUTRE et DAOUST, pour Demandeur.

ROSE et MONK, pour Tiers-Saisie.

BANK.—MANDATE.—ATTACHMENT.

SUPERIOR COURT, Montreal, 31st December, 1858.

Coram SMITH, J.

LYNCH *vs.* MCLENNAN et al., *and* BANK OF UPPER CANADA, Garnishee.

Held: 1° That the cashier or other officer of a Bank receiving money, as the attorney of another party, acts individually, and does not constitute the Bank such attorney.

2° That a draft upon a Bank, payable on presentation, the Bank being merely the instrument of conveying the sum, is not money in the hands of the Bank, belonging to payer and liable to attachment on his account.

Plaintiff placed a saisie-arrêt after judgment, in the hands of the Bank of Upper Canada, to attach monies coming to Defendants, representatives of late firm of Wilson, Jack and Hughes. The manager, in Montreal, of the Bank, appeared and made his declaration to the effect that, at the time of the service of the writ and since, the Bank held no funds belonging or due to Defendants. This declaration Plaintiff contested, alleging that, on or about the 21st November, 1856, there was due to Defendants, by the governement of the Province, the sum of £579. 14s. 2d. cy., for work performed by the previously existing firm of Wilson, Jack and Hughes, upon the Beauharnois Canal; that this amount was, at about said date, paid by the governement to Thomas J. Ridout, cashier of the Bank of Upper Canada, at Toronto, in his capacity of attorney of the firm, and was deposited by him in the Bank of Upper Canada, in his qualities of cashier of the Bank and attorney of the firm; that long before such deposit, the firm had been notorieusly dissolved by the death of Wilson, one of its members, and its dissolution was, at the time of the making of the deposit,

a public and well known fact, of which the Bank was in law bound to be aware; that, if the Bank had allowed said sum to go out of its hands, it could only have done so by connivance with parties interested in defrauding the creditors of Defendants and Plaintiff in particular, and was accountable for the amount.

The Bank answered that the sum mentioned in Plaintiff's contestation never came into the possession or power of the Bank, and never was deposited there to the credit of Defendants, and that no sum whatever, the property of Defendants, had since the service of the writ, been paid out of the Bank; and formally denied the imputation of connivance and fraud. The evidence disclosed that a warrant for £579 14s. 2d., issued from the receiver general's office, on the 21st Nov., 1856, in favor of Wilson, Jack & Hughes, and was paid to T. G. Ridout, the cashier of the Bank at Toronto, who gave his receipt therefore as attorney of said firm. A draft for the sum upon the Montreal agency, was then enclosed by mail, in a letter addressed "Messrs. Wilson, Jack and Hughes, Beauharnois, care Bank of Upper Canada, Montreal." Hughes, one of the firm, called at the Bank, endorsed the draft in the name of the firm, and was paid the amount. This took place some six months before the service of the writ.

SMITH, J.: A saisie-arrêt had been placed in the hands of the Bank of U. C. in Montreal, to attach monies due to a late firm of Wilson, Hughes & Jack, and Taylor, manager of the agency, made his declaration that the Bank held no such funds, which declaration Plaintiff contested. It appeared that Wilson, Hughes & Jack had some claim against the government which were paid by the receiver general to Thomas G. Ridout, of Toronto, cashier of the Bank of Upper Canada, on their account and Ridout remitted the amount. by a draft upon the agency in Montreal. One of the firm called, endorsed the draft, and drew the money. An attachment was put into the Bank, the manager declared there were no funds. Plaintiff contested, alleging that the Bank had improperly paid out the money, since it was notorious that the firm of Wilson, Hughes & Jack was dissolved by the death of Wilson, one of the partners (of whose estate Defendant, McLennan, in this case was curator), and that the Bank allowed the money to go out of their hands by connivance with the members of the firm. The point on which the case turns was, whether Ridout, the cashier of the Bank, in receiving the money on behalf of Wilson, Hughes & Jack, constituted the Bank their attorney or only himself individually became so. It were very questionable whether a Bank could, in any circumstances, become the attorney of a party; as a corporation, its powers were

allotted to it, and these did not include the representing and acting for individuals. Then Ridout's acts, as cashier, affected the Bank, only when they where within the scope of his office and related to matters which were in the regular course of the business of a Bank. His receipt, as cashier, for money deposited, was binding on the Bank but his receipt, even with the word "Cashier," for money received by him as attorney for another, was an individual receipt, and the designation "Cashier" could only be regarded as descriptive. (His Honor here referred to Angell & Ames, on *Corporations*, nos 296 and 300.) Being therefore the agent of the firm in question, and having no notice of dissolution, Ridout, in the execution of his mandate, transmitted the amount to the parties who were to receive it, making the agency in Montreal merely the instrument of conveying it. The Bank here could legally and justly affirm that it had held no funds belonging to Wilson Hughes & Jack or any of them.

JUDGMENT: "The court, considering that Plaintiff hath failed to prove the allegations of his contestation of the declaration of *Tiers-Saisie*, namely, that, at any time before the service of the writ of *saisie-arrêt*, there was deposited in the office of the Bank of Upper Canada, to the credit of Defendants, or of the firm of Wilson, Jack & Hughes, the sum of £579 14s. 2d. or any other sum of money whatever, and further, considering that it hath been fully established by Plaintiff's contestation, that the money was paid over to Ridout, in his capacity of attorney of the firm of Wilson, Jack & Hughes, and by him transmitted by draft, through the Bank of Upper Canada, at Toronto, to the branch Bank, at the city of Montreal, made in favor of the firm of Wilson, Jack & Hughes, and by the Bank, at Montreal, paid in due course of business, long before the issuing of the writ of *saisie-arrêt*; and further, considering that it is not established by evidence that such payment of money was made in any way in fraud of Plaintiff, nor of any other interested in said money, and that such payment was made in good faith, the Court doth dismiss the contestation. (3 *J.*, p. 84, et 9 *D. T. B. C.*, p. 257.)

DOUTRE and DAOUST, for Plaintiff.

ROSE and MONK, for *Tiers-Saisie*.

JUGEMENT.

IN THE CIRCUIT COURT, Quebec, 25th May, 1859.

Before STUART, Asst.-Judge.

BERTRAND *vs.* GUGY.

Jugé : Qu'un jugement une fois rendu ne peut être aucunement changé ou altéré, après l'ajournement de la cour.

The Plaintiff proceeded to proof, and obtained judgment, in the absence of the Defendant, who was not present when the case was called. The Defendant, on the following day, petitioned the court, supported by affidavit, to set aside the judgment, and to be allowed to establish his defence by the examination of his witnesses, alleging that the case had been unexpectedly called earlier than he had anticipated, and before the hour for which he had understood it had been fixed; that he had a good defence, and that, moreover, he had, on the day on which judgment was rendered, before the court had risen, and before the clerk of the court had registered the judgment, verbally made a simular application to the court; and that, inasmuch as the judgment was still unregistered by the clerk, the court had the discretionary power to withdraw the judgment, and allow him to establish his defence.

STUART, Asst.-Judge: I cannot grant the prayer of the petition. After a judgment has been rendered, it is out of the power of the court which renders it, after it has once adjourned, to withdraw, modify or change it in any way. (1) If Defendant is aggrieved by the judgment, he has his remedy notwithstanding that the case is non appealable. (9 *D.T.B.C.*, p. 260.)

CANNON, L. A., for Plaintiff.

GUGY, for Defendant.

CAPIAS

SUPERIOR COURT, Montreal, 26th February, 1859.

Before BADGLEY, Justice,

MCFARLANE *vs.* BELLIVEAU.

Jugé: Qu'un affidavit pour *capias* (émané sous la 22e Vic., ch. 5), énonçant les matières ci-dessous mentionnées, est suffisant. (2)

BADGLEY, Justice: This is a petition to quash a writ of *capias ad respondendum* issued against Defendant, under the

(1) 7 Pothier, *Procédure*, p. 90; 1 Pigeau, p. 424.

(2) V. art. 799 C. P. C.

recent statute, 22 Vict., ch. 5, sect. 48, the chief ground is that the affidavit does not come up to the requirements of the law which allows the issuing of a *capias*. In addition to the allegation of debt, "it shall be alleged, upon grounds to be stated "in the affidavit, that the Defendant is a trader, that he is no-"toriously insolvent, that he has refused to compromise or "arrange with his creditors, or to make a *cession de biens* to "them or for their benefit, and that he continues to carry on "his trade." The affidavit is made by Plaintiff, and states the cause of debt fully, the insolvency of Defendant, who is a trader residing in Arthabaska, and that deponent had been credibly informed and believed that he was immediately about to secrete his estate, debts and effects, with intent to defraud his creditors, and then adds, "that the grounds of de-"ponents' belief are, amongst others, the following: That "Defendant called a meeting of his creditors, on the eighteenth "day of November instant, at Montreal, and, then and there, "declared himself unable to meet his liabilities, and offered "to pay to his creditors ten shillings in the pound, payable in "two years, or twenty shillings in three years, without inte-"rest, and without security; and, afterwards, to wit, on the "nineteenth day of November instant, at another meeting of "his creditors, declared that, if said creditors did not accept "of his propositions, they would not get one shilling in the "pound; that Defendant was, then and there, requested by "his creditors to make an assignment or *cession de biens* to "them, or for their benefit, that Defendant refused to make "such assignment, and did not make such assignment although "so requested as aforesaid; that, by the statement of his af-"fairs shown to the creditors by Defendant, it appears that he "had, and has, a large *surplus* of assets over and above his "liabilities, notwithstanding which Defendant offered his cre-"ditors the sum of ten shillings in the pound on their respec-"tive amounts, without security, payable in two years, or "twenty shillings, without interest payable in three years, "that Defendant continues to carry on his business and "trade." These allegations, I hold to be sufficient, and they are supported by the evidence taken on the petition. The application must therefore be rejected. (9 *D. T. B. C.*, p. 261.)

LAFLAMME, R. and G., for Plaintiff.

CARTIER, BERTHELOT and POMINVILLE, for Defendant.

CAPIAS.

SUPERIOR COURT, Montreal, 30th April, 1860.

Coram BADGLEY, J.

MACFARLANE *vs.* BÉLIVEAU.

Held : That in an action commenced by *capias ad respondendum* and wherein judgment has been rendered declaring such *capias* good and valid, a *capias ad satisfaciendum* will issue, on proof by Plaintiff petitioning that the Defendant *under bail* has not according to the 12 Vict., ch. 42, fyled in the prothonotary's office a statement under oath of all his credits, property and effects, and such Defendant will be imprisoned for a space of time at the discretion of the court not exceeding one year (1)

2nd. That Defendant need not have notice of such petition.

Action by *saisie-arrêt avant jugement* and *capias ad respondendum*, by Plaintiff against Defendant under 22 Vict., ch. 5, sec. 48, writs issued the 20th November, 1858. Defendant arrested and gives bail 25th November, 1858, to sheriff of the district of Arthabaska. Special bail put in the 21st December, 1858. Judgment in favor of Plaintiff, the 30th June, 1859, declaring *saisie-arrêt* and capias good and valid. On the 26th April, 1860, Plaintiff petitioned the court, shewing : The issuing of capias and arrest of Defendant ; the furnishing of special bail ; the rendering of final judgment. "That Defendant has neglected and omitted to fyle, within the delays prescribed by law, in the office of the prothonotary a statement under oath, indicating the moveables and immoveables that he possess, and the place where the same are situated, in order that Plaintiff may proceed to attach the same by execution, and also indicating the names and residences of his debtors and the amount of the indebteness of each, and also a declaration that Defendant is ready to abandon and give up to his creditors the effects and property in such statement set forth. And whereas, by such refusal and omission, and that the judgment exceeds the sum of £20 currency, the Petitioner prays that a writ of *capias ad satisfaciendum* do issue against the body of Defendant, and that he be arrested and imprisoned in the common jail of this district, for a space or term of one year, or such other time as this honorable court may order."

THE COURT, having heard Plaintiff and Petitioner, upon his petition, considering that Defendant hath not fyled the statement under oath, required under the provisions of the 12 Vict., ch. 42, doth, therefore, order Defendant to be empri-

(1) V. art 763 et s. C. P. C.

soned in the common gaol of the district of Montreal, for the period of one year. (4 *J.*, p. 357.)

LAFLAMME, R. and G., for Plaintiff and Petitioner.

CARTIER and POMINVILLE. for Defendant.

IMPENSES.—USUFRUIT.

BANC DE LA REINE, EN APPEL, Montréal, 7 juin 1859.

Presents: Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et MEREDITH, Juges

FAUTEUX, Appelant, et BOSTON, Intimé.

Jugé: 1° Que sur réclamation pour impenses et améliorations sur des héritages dont l'usufruit seul a été saisi, il ne peut être accordé qu'une proportion de la valeur de telles impenses, suivant la plus-value qu'en a reçu l'usufruit. (1)

2° Qu'en semblables cas, l'Opposant qui souffre une réduction de sa demande doit payer les frais de la contestation. (2)

La contestation était mue entre deux Opposants à la distribution des deniers provenant de la vente de l'usufruit de deux héritages saisis à la poursuite de l'Intimé, créancier en vertu d'un jugement obtenu contre Dame Leroux. L'Appelant réclamait, par privilège, sur les deniers prélevés la somme de £219, pour impenses et améliorations par lui faites sur ces deux héritages, dont Dame Leroux lui avait cédé l'usufruit durant l'espace de cinq ans, en vertu d'un acte de dotation en paiement, contenant la stipulation qu'au cas où l'Appelant ferait lui-même de grosses réparations de nécessité, qu'il en serait remboursé par Dame Leroux, à dire d'experts. Par l'ordre de collocation, l'Appelant était colloqué pour le montant entier de sa réclamation, et l'Intimé ne devait recevoir que £18 18 7, en déduction de sa créance qui s'élevait à £181 11 0, et intérêts. L'Intimé contesta l'ordre de collocation, ainsi que la réclamation de l'Appelant, prétendant que ce dernier n'avait pas droit de faire des constructions nouvelles sur les héritages en question, et ne pouvait en demander le prix ; que quant aux grosses réparations elles ne valaient pas la somme que l'Appelant en demandait, sans dire quelle somme elles valaient ; et qu'au surplus l'Appelant n'en pouvait réclamer que la proportion dont la valeur de l'usufruit vendu pouvait en avoir été augmentée. Une expertise fut ordonnée, et le rapport des experts établit que les grosses réparations faites par l'Appelant valaient £6 10 ; que la valeur de toutes les constructions et

(1) V. art. 417 C. C.

(2) V. art. 478 C. P. C.

grosses réparations étaient, au jour de la vente de l'usufruit, de £195, et que telles réparations et constructions avaient augmenté la valeur de l'usufruit vendu de £100. La cour, adjugeant sur la contestation, accorda à l'Appelant £6 10 pour ses grosses réparations, et £100 pour la plus-value donnée à l'usufruit par ses constructions, et condamna néanmoins l'Appelant aux frais de contestation. Ce jugement rendu par la Cour Supérieure, à Montréal, le 29 novembre 1858, est comme suit : " La " cour, considérant que Fauteux, n'a droit, par privilège, sur " les deniers rapportés devant cette cour, qu'à la somme de " £106 10 0, savoir : £6 10 0, pour grosses réparations par lui " faites sur les immeubles en question, aux termes de l'acte de " dation en paiement du 26 août 1848, et £100, pour la plus-" value qu'ont acquis les immeubles par les bâtisses et cons-" tructions qu'y a faites Fauteux : ordonne et adjuge que le " rapport de collocation et distribution soumis par le protono-" taire de cette cour soit réformé comme suit, quant à ce qui " regarde Fauteux, savoir, qu'il ne lui soit accordé que la dite " somme de £106 10, pour les causes sus-énoncées, en sus de " ses frais d'opposition. Et la cour condamne Fauteux aux frais " de contestation." Fauteux appela de ce jugement, se plaignant, 1° du retranchement qu'on lui faisait de la somme de £89, sur la valeur de toutes les constructions par lui faites, et ce au profit de l'Intimé qui n'avait aucune hypothèque sur le fonds mais sur l'usufruit seulement ; 2° de l'adjudication des frais de contestation contre lui, l'Intimé n'ayant rien admis. Ce jugement a été confirmé dans son entier, la cour étant d'opinion que l'Appelant ne pouvait exiger plus que la cour de première instance lui avait accordé ; et, quant aux frais, il fut dit, que, sur distribution de deniers après saisie, les créanciers doivent observer de ne demander que ce qui leur est justement dû, et que les autres créanciers qui ne peuvent être censés connaître toutes les transactions de leur débiteur ont droit d'en exiger la preuve parfaite, et ont même droit d'être colloqués, par préférence, pour les frais par eux encourus en faisant une contestation qui tourne au profit de la masse des créanciers. Le juge-en-chef différant d'opinion quant aux dépens en cour de première instance. (9 *D. T. B. C.*, p, 263.)

CARTIER et BERTHELOT, pour l'Appelant.

LEBLANC et CASSIDY, pour l'Intimé.

PROCEDURE.—SOCIETE.

SUPERIOR COURT, QUEBEC, 2 May, 1859.

Before STUART, ANDREW, Asst.-Judge.

BOSQUET *vs.* MCGREEVY.

A B et C contractèrent avec D pour lui fournir une quantité de pierre; subséquemment D refusa de leur permettre de remplir le contrat; A porta alors, en son propre nom, contre D une action en dommages pour inexécution du contrat:

Jugé: 1° Sur défense au fonds en droit, que l'action ne pouvait être maintenue, en autant qu'elle eût dû être portée par tous les trois. (1)

2° Que dans le cas où trois personnes entreprennent conjointement un certain contrat, elles deviennent à toute fin quelconque sociétaires, en autant qu'il s'agit de tel contrat et doivent procéder conjointement, et ne peuvent porter séparément une action pour leur part de la perte résultant de l'inexécution du dit contrat. (2)

The action was founded on a notarial deed or contract by which Plaintiff, and others therein named, agreed to furnish Defendant a certain quantity of stone for a house he was then building. After a certain portion of the stone had been delivered, Defendant refused to receive any more alleging that it was not of the quality Plaintiff and the other parties to the deed had contracted and agreed to deliver to him. The Plaintiff, then, in his own name, and without joining in the action the other parties to the contract, brought the action, for the alleged breach of the contract by Defendant, to recover the alleged damages sustained by him, by the loss of other contracts, and the expenditure of large sums for the purchase of tools and other working implements, to enable him to fulfil his contract with Defendant.

VANNOVOUS, for Defendant, demurred to the action, on the ground that Plaintiff, in his own name, and alone, could not sustain the action, inasmuch as the breach complained of was of a contract intered into by Defendant, not with Plaintiff alone, but with Plaintiff and other persons therein named and that, consequently, if Defendant were liable to an action at all it was to a joint action by all the parties to the deed or contract; that these persons, having thus jointly entered into a contract with Defendant, were to be considered as partners in this particular transaction, and could only bring their joint action as such; that Plaintiff and each of the other parties to the deed could not maintain a separate action for an alleged breach of the contract.

BOSSÉ, for Plaintiff, contended that the principle of law with

(1) V. art. 120 § 8 C. P. C.

(2) V. art. 1830 C. C.

respect to copartners did not apply here; that the parties to the deed were not copartners, nor had they any partnership or corporate name, they were simply so many distinct individuals, who had entered into a contract with Defendant, each one independently of the other, and having separate interests and that, consequently, each could maintain a separate action for his loss or damage sustained by the breach. (1)

STUART, A. Asst.-Judge: The demurrer must be maintained. Where several persons associate themselves together for a particular speculation, or for the performance of a particular contract, they are to all intents and purposes partners in such joint concern, and must bring their joint action as such (2). The Plaintiff, therefore, cannot maintain an action in his own name; the action must be a joint action by all the parties to the deed, for they are all partners as respects this particular transaction or contract, and must bring their action as such. Action dismissed. (9, *D. T. B. C.*, p. 266.)

BOSSÉ, for Plaintiff.

VANNOVOUS, for Defendant.

DEPENS.

COUR DU BANC DE LA REINE, EN APPEL,
MONTRÉAL, 6 juin 1859.

Présents: SIR L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL et MEREDITH, Juges.

OUIMET et al., Appelants, *et* PAPIN, Intimé.

Jugé: Qu'un jugement qui met au néant le *verdict* ou rapport d'un jury et condamne l'Intimé *à payer les frais en cour inférieure*, comprend tous les frais du procès par jury, et non pas seulement les frais sur la motion pour mettre le verdict au néant.

Le 12 mars 1857, la Cour du Banc de la Reine, siégeant en appel, à Montréal, procédant à adjuger sur un appel, Louis Beaudry, Appelant, et Joseph Papin, l'Intimé en cette cause, infirmait un jugement de la Cour Supérieure de Montréal, qui avait rejeté une motion de Beaudry, tendante à faire déclarer nuls le verdict et les réponses du jury, et à obtenir une nouvelle épreuve; et la Cour d'Appel ordonnait qu'un nouveau procès aurait lieu, pour instruire le litige entre les parties, et que *l'Intimé paierait les frais en Cour Supérieure.* Sur ce jugement, les Appelants, qui avaient obtenu distraction de

(1) 6 Toullier, p. 742, Nos 711, 714, 751, 753.

(2) Pothier, *Obligations*, No 266.

dépens, firent taxer leurs frais, tant en Cour d'Appel qu'en Cour Supérieure, incluant dans les derniers les frais du procès par jury depuis la motion pour un *venire facias*, et l'indemnité allouée aux témoins ; un writ d'exécution fut émané contre l'Intimé pour la somme de £99 1 2. L'Intimé se porta opposant à l'exécution, prétendant qu'il ne pouvait être tenu de payer plus de £52 2 2, savoir : £51 8 6, montant des frais taxés sur l'appel, et 13/8 pour honoraires sur la motion faite en cour inférieure pour obtenir un nouveau procès.

Cette contestation soumise à la Cour Supérieure fut jugée en faveur de l'Intimé le 28 novembre 1857. (1) La cause fut de nouveau soumise à la Cour d'Appel, pour en obtenir l'interprétation de cette partie de son jugement du 12 mars 1857, et le jugement de la cour de première instance a été infirmée par la sentence qui suit : " LA COUR attendu que cette cour, par son jugement en date du 12 mars 1857, en statuant sur les dépens a accordé à l'Appelant les frais en Cour Inférieure indistinctement, et qu'en mettant le dit jugement à exécution, tous les frais du procès par jury et les frais encourus subséquemment au verdict devaient entrer en taxe en faveur de l'Appelant, et être compris dans l'exécutoire ; attendu que la Cour Supérieure, en mettant de côté la taxe des dépens, telle que faite par le juge C. Mondelet, alors un des juges de la dite cour, le 29 juillet 1857, et en maintenant l'opposition formée par l'Intimé à l'exécutoire des dépens et à la saisie-exécution pratiquée en cette cause, a mal jugé : infirme, annule et met au néant le jugement de la Cour Supérieure, dont est appel, et, procédant à rendre le jugement que la dite cour aurait dû prononcer, il est considéré et adjugé que la dite opposition soit, comme elle l'est, par ces présentes renvoyée. (9 *D. T. B. C.*, p. 268.)

LORANGER, pour l'Appelant.

LAFRENAYE, pour l'Intimé.

(1) " THE COURT : Considering that Opposant hath fully established the material allegations of his opposition, and that Plaintiffs *par distraction* had no right to take in execution the goods and chattels of Opposant for any larger or greater sum than the costs awarded in and by the judgment rendered in the Court of Queen's Bench appeal side ; and considering that, by judgment, the costs awarded to Plaintiffs *par distraction* were such costs only as were incurred subsequently to the motion for a new trial, which said motion had been refused by the court below ; and, considering that the judgment in appeal reverses the judgment in the court below, without any mention whatever of costs as regards the said motion ; and considering that the proceedings in the court below are only by said judgment rendered, from the time of the rendering of the judgment of the court below, or the said motion for a new trial ; and further considering that, by said motion in the court below, no costs whatever are asked or demanded by Plaintiffs in the court below, the court doth reject the contestation of Plaintiffs *par distraction*, and doth declare the offer made by Opposant before the issuing of the writ of execution *de bonis*, and subsequently reiterated in and by said opposition to be good and valid, and doth maintain the opposition.

REGLES DE PRATIQUE.—INTERPRETATION.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 17th June, 1859.

Before AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

ROSS, Appellant, *and* SCOTT, Respondent.

Jugé : Que les règles d'une cour sont sujettes à son contrôle, et seront relâchées dans les cas où une exécution rigide de telles règles opérerait une injustice réelle.

BOSSÉ, for Respondent, moved for the dismissal of the appeal, on the ground that the signature of Appellant's attorney was not attached to the writ of appeal, in conformity with the seventh rule of practice of the court.

PENTLAND, John C., on behalf of Appellant, moved for leave to amend, by affixing the signature to the writ of appeal.

AYLWIN, Justice : The motion to amend will be granted. The question has already arisen, and I have conferred with the Chief-Justice upon it, and we are determined, in this court, to give no encouragement to motions to dismiss on the ground of this irregularity or omission ; the motion to amend will therefore be granted, of course, on payment of costs ; it must be left to the delicacy of feeling of the Respondent to say whether, under the circumstances, he will accept the costs, and the motion to dismiss is discharged.

MONDELET, CHARLES, Justice : I have the misfortune to differ from the majority of the court upon this point of practice. The rule of practice which applies here, is, to my mind, not merely directory, but peremptory, and it was so held in a case in which I was concerned when practising at the bar, in which the late sir James Stuart, who was also then practising at the bar, and was opposed to me, took the objection, and the court, much to my regret and disconfiture (though I admitted the correctness of the decision), unanimously maintained it, and I was shut out from my right of appeal. If this rule of practice is not maintained, it will be impossible, in my humble opinion to say what rule is peremptory, or merely directory.

AYLWIN, J. : In the case referred to, was there any motion made for leave to amend ?

No, there was not, but I do, not see that this would alter the case at all because, if the rule be peremptory, as I believe it to be, it must be complied with originally, otherwise the irregularity is fatal. So long as the rule exists, it ought to be enforced. if it is unecessarily severe or unjust, it ought to be rescinded.

DUVAL, Justice : I recollect a case in which I was concerned,

when at the bar, in which the late Sir James Stuart held that this rule was directory, and not peremptory. The rules of a court are by a well settled jurisprudence, within its own control; they are made for the protection of suitors, and wherever the court sees that rigorous enforcement of a rule will operate an absolute injustice, as in the present instance, by shutting a party out from his right of appeal, it will relax the severity of the rule, I will, therefore, always discharge motions made to dismiss an appeal, founded on this omission or irregularity.

AYLWIN, Justice: The motion to amend is granted; the motion to dismiss is discharged. (9 *D. T. B. C.*, p. 270.)

PENTLAND and PENTLAND, for Appellant.

BOSSÉ, for Respondent.

CONTRAINTE PAR CORPS.—PROCEDURE.

SUPERIOR COURT, Quebec, 25 novembre 1858, et 4 juin 1859.

Before BOWEN, Chief Justice.

GUGY *vs.* DONAHUE.

Jugé: Par BOWEN, Juge-en-Chef, et CHABOT, Juge: Que la cour a le pouvoir discrétionnaire d'accorder ou de refuser la contrainte par corps contre un Défendeur, à défaut de satisfaire à un jugement dans une action de dommage pour libelle. (1)

Par CHABOT, Juge: Que dans le cas où les formalités prescrites par le jugement ordonnant la contrainte par corps n'ont pas été remplies, le Défendeur sera libéré et élargi sur motion.

The Plaintiff having obtained judgment against Defendant for the sum of £35, in an action of damages for libel, moved the court for a *contrainte par corps* to attach the body of Defendant, on the ground that he had not satisfied the judgment, nor any part thereof, and that four months had expired since the rendering of the judgment against him.

GUGY, for Plaintiff, contended that he was entitled to it as a matter of right, under the second article of the ordinance of 1667.

DUGGAN, for Defendant, maintained that Plaintiff was not entitled to it, as a matter of right; that it was discretionary with the court to grant or refuse it; and that the practice of the court had invariably been to refuse it in actions for libel. (2)

BOWEN, Chief Justice: The ordinance of 1667 abolished the *contrainte par corps*, except in certain cases specified in the

(1) V. art. 2272, § 4 C. C.

(2) *Ferguson* vs. *Roger*, n° 1499, Superior Court, 1855.

second article (1), and in which excepted cases the party was entitled to the writ, as a matter of right, but when this article was homologated by the council in Canada, it was modified, and it was left to the discretion of the judge to grant or to refuse it. (2) Having this discretionary power, therefore, I am of opinion, that the present case is one in which the writ ought to be granted; no man's character would be safe from the calumnious attacks of a journalist, unless he were afforded the protection of the *contrainte par corps*, in cases where Defendant either has no effects, or has disposed of them, to avoid satisfaction of a judgment rendered against him in damages, for such calumnious newspaper attacks. The judgment of the court, therefore, is," condemning the Defendant anew, *d'iterato* to pay the amount of the judgment, *within fifteen days from the service of the second judgment upon him*, in default of which, and the fifteen days expired, a writ of attachment (*contrainte par corps*) do issue against the body of the Defendant to be confined and detained, &c." A few days subsequently to the rendering of this judgment, Plaintiff filed a a certified copy, with the return of a bailiff annexed thereto, in which he certified that he had made diligent search during three days for Defendant, with whom he was well acquainted as well as with his place of abode, but had been unable to find him, that he had ascertained that he had left his domicil in Lower Canada, and had gone to reside in Toronto, in Upper-Canada, and that he had been and was, consequently, unable to serve the judgment upon him. In the month of May following, Plaintiff hearing that Defendant was in Quebec, sued out the *contrainte par corps*, in virtue of which Defendant was arrested and confined in goal. The Defendant, after having unsuccessfully applied to three different judges in vacation, to be discharged out of custody, on the ground that the second judgment had not been served upon him, (3) made a motion to that effect, on the first day of the June term of the court, CHABOT, Justice, sitting. The grounds of the motion were: 1° that the conditions of the second judgment had not been complied with, inasmuch as Plaintiff had never served Defendant with a copy thereof, as in and by said judgment he was

(1) Tit. 2nd, article 34: "Pourront néanmoins les contraintes par corps, "après les quatre mois, être ordonnées pour les dépens adjugés, s'ils montent "à deux cents livres et au-dessus; ce qui aura lieu pour la restitution des "frais, et pour les dommages et intérêts au-dessus de deux cents livres."

(2) "Sur le second article, que les contraintes par corps ordonnées après "les quatre mois pour les dépens adjugés seront à l'arbitrage du juge, si les "dépens montent jusqu'à cent livres, et ainsi pour la restitution des frais, dom-"mages et intérêts."

(3) Ex parte Donaghue, 7 *R. J. R. Q.*, p. 2.

bound to do; 2° that it did not appear by the writ of *contrainte par corps*, that any judgment ordering the issuing of a *contrainte par corps*, was ever rendered ; and 3° that the writ of *contrainte par corps* did not contain an exact statement of the amount of the costs awarded against him.

DUGGAN, for Defendant, argued that, where all the formalities required by the judgment ordering the *contrainte* had not been complied with, Defendant was entitled to his discharge, and that his arrest was consequently illegal, that this had been held in a number of cases in France, and was the principle universally acted upon. (1)

GUGY, for Plaintiff, argued that a motion was an english proceeding, and that a *contrainte par corps* was a french proceeding, and that, consequently, resort could not be had to english practice to control a purely french proceeding; that the *contrainte* could not be set aside by motion, a *requête libellée* being the proper remedy to set aside a *contrainte par corps*, on the ground of informality, if any informality existed (2). That the return of the bailiff shewing that he had used all possible diligence, and was unable to serve Defendant in consequence of his having absented himself, rendered a service unecessary, inasmuch as, to insist upon service, under such circumstances, would be to defeat the object and aim of the law, by insisting upon the performance of an absolute impossibility.

CHABOT, Justice: La question qui se présente ici est de savoir si le jugement d'une cour compétente qui ordonne quelques conditions, que ces conditions soient légales ou illégales, peut être mis à exécution sans se conformer à ces conditions. Si les conditions sont illégales, la partie a le droit de les faire mettre de côté ; mais, tant que ces conditions existent, il faut qu'elles soient exécutées. L'ordonnance de 1667 avait pour objet l'abolition de la *contrainte par corps*, avec certaines exceptions, et quand cette ordonnance fut homologuée par le Conseil en Canada, le 2e article fut modifié, et au lieu d'accorder la *contrainte* comme matière de droit, il fut laissé à la discrétion du juge, de l'accorder ou de la refuser, et il a été décidé, en bien des causes, que les cours ici ont cette discrétion (3). Ayant cette discrétion, elles peuvent annexer telles conditions qu'elles croient légales, et il est nécessaire que ces conditions soient observées. Le jugement en cette cause ordonnant la *contrainte par corps* a aussi ordonné qu'il devrait être servi sur le Défendeur, et il n'a pas été servi sur lui du tout. Il ne

(1) 4 Guyot, *Répertoire*, p. 598 ; 5 Nouveau Denisart, 462.

(2) 1 Pigeau, p. 844 ; Fournel, *Traité de la contrainte par corps*.

(3) 1 *R. J. R. Q.*, p. 359, à la note.

suffit pas au Demandeur de dire qu'il ne lui était pas possible d'observer cette condition du jugement, s'il l'a trouvé impossible, il avait bien le temps dans l'intervalle, depuis le mois de novembre au mois de mai, de prendre les procédures nécessaires pour obvier à cette difficulté. La cour, en conséquence, est d'opinion que la *contraiute par corps* a été émanée illégalement. La *contrainte par corps* est conséquemment mise de côté. (9 *D. T. B. C.*, p. 274.)

GUGY, for Plaintiff.

DUGGAN, for Defendant.

DUNBAR ROSS, Q. C., Counsel for Defendant.

HABEAS CORPUS.

DISTRICT OF QUÉBEC, IN CHAMBERS.

Ex parte DONAGHUE.

Jugé par DUVAL et MEREDITH, Juges : Qu'un writ d'*habeas corpus* ne peut être accordé pour libérer un prisonnier détenu sur mandat émané dans une cause au civil, quand bien même le mandat au moyen duquel il aurait été arrêté serait irrégulier.

Par DUVAL, Juge : Que le writ d'*habeas corpus* n'est pas accordé afin de reviser les jugements des tribunaux civils, ou de révoquer en doute la régularité de leurs procédures, soit avant ou après jugement, mais seulement pour maintenir les cours dans leur juridiction, et non pour corriger leurs erreurs.

Par MEREDITH, Juge: Qu'en supposant même le mandat d'arrêter irrégulier, néanmoins s'il n'appert pas qu'il y a excès de juridiction de la part du tribunal qui l'a émané, il ne peut être déclaré nul, et par conséquent le détenu ne peut être élargi sur *habeas corpus*.

Par STUART, Juge-Assistant: Que lorsque qu'un writ d'*habeas corpus* sur demande faite à un juge en chambre est refusé, un autre juge, par égard, refusera d'entendre une pareille demande. (1)

Donaghue was imprisoned, in virtue of a *contrainte par corps*, issued for non satisfaction of a judgment rendered against him, in the case of *Gugy* vs. *Donaghue* in an action of damages for libel. (2) The judgment *d'iterato* granting the *contrainte par corps*, condemned Donaghue, within fifteen days of the service of the second judgment upon him, to pay the amount of the same, and, in default thereof, that a writ of *contrainte par corps* should issue against his body. About four or five days after the rendering of this judgment, on the 1st December, 1858, Plaintiff returned it into court, with the certificate of a bailiff, to the effect that he had made diligent search, during three days, for Donaghue, and was unable to find him, that he had been informed that he had left his residence in Quebec,

(1) V. art 1052 C. P. C.

(2) Suprà, p. 234.

and had gone to reside in Toronto, and that, consequently, he was unable to serve a copy of the judgment upon him. On the 17th May following, Plaintiff, hearing that Donaghue was in Quebec, caused the *contrainte par corps* to issue, in virtue of which he was arrested and confined in the common goal of the district.

DUGGAN now made application before DUVAL, Justice, in chambers, on behalf of Donaghue, to have him discharged from custody, under a writ of *habeas corpus*, on the ground of the irregularity and insufficiency of the writ of *contrainte par corps*, in not specifying the judgment *d'iterato*, authorising the issuing of the *contrainte par corps*, and that service of the same had been made on Donaghue, in accordance with the terms of the judgment itself; and that, in point of fact, said judgment *d'iterato*, had never been served upon Donaghue at any time, and that, consequently, the warrant of commitment, and the proceedings had in the cause, were irregular and illegal, and Donaghue was, therefore, entitled to his discharge. (1)

DUVAL, Justice: The writ of *habeas corpus* is not granted for the purpose of reviewing the judgment of a court, or of questioning the regularity of the proceedings before that court. The object of the writ is to keep courts within their jurisdiction, not to correct their errors, this must be done by appeal or by writ of error. In this case, I have before me a writ issued out of the Superior Court for this district, against a Defendant who has been condemned to pay damages. It is impossible to call in question the jurisdiction of the Superior Court, or its right to imprison; for this right is recognized by the 15th clause of the 12 Vic., c. 42. On what ground is it supposed I can interfere? It has been argued that the proceedings required to entitle Plaintiff to a *contrainte par corps* have not been followed. I can no more revise or call in question the proceedings taken after judgment than I can those adopted before judgment, and it is right it should be so, otherwise a single judge of an inferior court, authorised to grant a writ of *habeas corpus*, might set aside the judgment of a court of superior jurisdiction, thereby reversing the judgment, which can be done only on appeal or by writ of error. This is the reason of introducing that part of the clause in our *habeas corpus* act which denies the writ to a person detained in execution in a civil suit. It is an error to assimilate the writ of execution issuing out of a court of civil jurisdiction to a warrant of commitment signed by a magistrate. But, even if

(1) 4 Manning and Granger, p. 516; 59 English Common Law Reports, p. 730; Kinning's Case.

there were any analogy, this would not help the petitioner. For no defect in a commitment can be noticed, if their is a valid conviction.To ascertain this last fact,it would be necessary to remove the whole record by *certiorari*. That record I have not. The case referred to by the prisoner's counsel, is not applicable. There, power was given to a subordinate court to imprison on certain terms. It is clear this *surbordinate* power must be controlled, and the judge who makes the order must do so in the words of the law. From this, however, it does not follow that the order of detention addressed to the keeper of the common gaol need set forth more than would be required in a criminel case. Seeing, therefore, that the warrant has issued from a court of competent authority, in a cause over which it clearly had jurisdiction, I cannot order the prisoner to be discharged from custody.

DUGGAN afterwards renewed the application before MEREDITH, Justice in Chambers, when DUNBAR ROSS, Q. C., supported the application contending, that the warrant of commitment was insufficient and illegal, inasmuch as it did not shew that the judgment *d'iterato* had been pronounced in a case in which the court had power to issue an attachment against the body, in default of payment of the amount of the judgment ; that it merely specified that judgment in an action of damages had been rendered against Donaghue, and remained unsatisfied, but that this was not sufficient, because the court had not the power to issue an attachment against the body of a Defendant. for non-payment of a judgment in an action of damages ; that the judgment against Donaghue might be in damages for non-payment of a promissory note, or a sum of money lent, in which case the court had not power to issue an attachment against his body, that it was only in cases of a judgment in damages for personal wrongs, or where Defendant was acting fraudulently, that his body was liable to attachment ; and that, inasmuch as it appeared, by the warrant of commitment, that the judgment was rendered merely in an action of damages, and as the court had no power to issue attachment against the body, in such case, Donaghue's detention in jail was illegal, and he was entitled to his discharge, as a common law right, and a single Judge in vacation had consequently the power by *habeas corpus* to release him. (1)

GUGY, for Plaintiff : The warrant of commitment was sufficient ; it was not necessary that all the particulars of the sentence or judgment *d'iterato* should be set forth, so long as it appeared to have issued from a court having competent jurisdiction to issue it, and, even if the warrant were irregular or

(1) McCullock's case decided by Mr. Justice André Taschereau in 1851.

insufficient in this respect, it could not be voided by *habeas corpus*, but, if at all, must be by the proper remedy open to a Defendant in all civil suits (1). That, even supposing the defect or insufficiency of the warrant of commitment complained of existed, a judge cannot interfere by *habeas corpus*, to inquire into such irregularity, nor review the judgment of a Superior Court, it is sufficient (no matter how irregular may be the warrant) that the court from which it issued, had jurisdiction and power to issue it, otherwise a judge might set aside every judgment of a superior legal tribunal (2). The judge is bound to presume the proceedings of the court to be correct (3). Even if the court which issued the warrant had not jurisdiction, a judge, in vacation, cannot discharge a prisoner confined under civil process (4). That the first *habeas corpus* act in force in this province, 24 Geo. III, cap. 1, refers exclusively to criminal matters ; and the second, 52 Geo. III, cap. 8, sec. 6, expressly excepts from the operation of the statute persons confined on civil process. That the provincial statute 12 Vic., cap. 42, entitled " An act to abolish imprisonment for debt, &c," also expressly excludes from the operation of the act, cases like the present one, by section 15 (5). But even supposing that a judge in vacation could inquire into the irregularity of the warrant or proceedings, the circumstance that the judgment *d'iterato* had not been served upon Defendant, in consequence of his having removed his residence out of Lower Canada, would not justify his discharge out of custody, as, in such case, the inability to serve him, in consequence of his own avoidance of service, would render a service unnecessary (6). The Defendant was, therefore, legally detain-

(1) *Rex* vs. *Suddis*, 1 East's Reports, p. 306 ; In re Cobbitt, 7 Queen's Bench Reports, p. 187 ; 53 English Common Law Reports, p. 185 ; *Regina* vs. *Dunn*, 12 Ad. and El., p. 599 ; *Regina* vs. *Douglas*, 12 Law 1. N., S. p. 49 ; *Burdett* vs. *Abbott*, 5 Dowling's *Practice cases*, p. 199 ; *Barber* et al. vs. *O'Hara*, 4 R. J. R. Q., p. 212 ; Mercure and Laframboise et al., 4 R. J. R. Q., p. 322 ; Fournel, *Traité de la contrainte*, pp. 208, 212.

(2) In re Dunn, 12 *Jurist Reports*, p. 99 ; Ex parte Andrews, 56 Eng. Com. Law Reports, p. 228.

(3) In re Brennan, 59 Erg. Com. Law Repts, p. 492.

(4) *Hogan* et al. vs. *Gordon*, 6 R. J. R. Q., p. 458.

(5) By this section it is enacted : " That nothing in this act contained shall extend or be construed to extend to exempt from arrest or imprisonment, any person who may be indebted as tutor, curator, sequestrator, depositary, sheriff, coroner, bailiff or other officer having charge of public monies, or who may be a *caution judiciaire*, or indebted for the purchase money of any lands or tenements, goods or chattels, sold and adjudged under the authority of justice by licitation, sheriff's sale *décret*, or orherwise, or for the amount of any condemnation money for damages arising out of personal wrongs for which *contrainte par corps* may be now by law awarded."

(6) *Mettayer* et al. vs. *McGarvey*, 6 L. C. Reports, p. 148.

ed by a warrant from the Superior Court having full jurisdiction, and was consequently legally and rightfully detained in jail, and could not be discharged till he had satisfied the judgment.

MEREDITH, Justice : The Petitioner, who is confined in the common jail of this district, under a writ of execution issued from the Superior Court, has applied for a writ of *habeas corpus*, in order that he may be discharged from custody, in consequence of the alledged illegality and insufficiency of the writ under which he has been arrested. The Plaintiff resists the application thus made on the ground that Defendant, being charged with process in a civil suit, is not entitled to the relief which he seeks, and, in support of this view, Plaintiff refers to the 6th section of the 52 Geo. III, c. 8, which is as follows: " And be it further enacted and provided, that " nothing in this act contained shall extend to discharge out " of custody any person charged in debt, or other action, or " with process in any civil action." And this provision of law, I may observe, is perfectly in harmony with the principles of the common law on the same subject. The Petitioner, indeed, does not contend that I have power, under a writ of *habeas corpus*, to liberate from prison a person legally charged with process in a civil suit ; but it is contended that the writ of execution under which he has been arrested is void, because, although it sets forth the judgment of the court between the parties, it does not mention that a sentence *d'iterato*, as it is termed, was pronounced, or that the formalities required by law in such cases were observed.

As a *contrainte par corps* has issued from the Superior Court of this district, according to the authorities about to be cited, I must presume that a *sentence d'iterato* was duly pronounced, and regularly served ; and it, doubtless, would have been more regular if the pronouncing of that order, and the service of it, had been expressly mentioned in the execution ; but I know of no law which requires this to be done on pain of nullity, and on the contrary, the maxim *omnia præsumuntur rite esse acta*, is clearly applicable in the present matter. In the important case of *Gosset* vs. *Howard*, 10, Ad. and El. N. S., p. 359, decided in the Court of Exchequer Chamber, by Baron Parke and five other judges, the law on this subject is very fully explained. Baron Parke, in rendering the unanimous judgment of the court in that case, said : " It is " presumed, with respect to such writs as are actually issued " by the superior courts, that they were duly issued, and, in a " case in which they had jurisdiction, unless the contrary ap- " pears upon the face of them, as it would, for instance, if a " writ of *capias* for a criminal matter issued from the Com-

" mon Pleas in which case the want of jurisdiction would ap-
" pear. But writs issued by a Superior Court, not appearing to
" be out of the scope of its jurisdiction, are valid, and of them-
" selves, and without any further allegation, a protection to
" all officers acting under them, and that, although they are
" on the face of them irregular, as a *capias* against a Peeress,
" (6 Rep., 54), or void in form, as a *capias ad respondendum*
" not returnable the next term." And the learned Baron closed his observations on this point with these forcible words: "It
" appears, indeed, that if a writ of a Superior Court expressed
" no cause at all, it would be legal, and the Defendant not bai-
" lable according to what Lord Coke says, in Brewer's case (1 Roll Rep., 34). There can be no doubt, according to the remarks made by the same learned judge in that case, that, as a general rule, writs of execution "recite the cause of their issuing," and "show their legality," but it is equally plain from the same judgment that, although the writ in this case in this respect, is irregular, yet, as it does not appear to be out of the scope of the jurisdiction of the court from which it issued, it cannot be declared void. On the contrary, the sheriff was bound to execute it as he has done. This being the case, it is plain that Petitioner is now " charged with process in a civil action," and, consequently, according to the plain words of the statute, a judge in vacation cannot discharge him under a writ of *habeas corpus*. The learned counsel for Petitioner has cited *Ex parte* Kinning, as establishing that Petitioner ought to be liberated in consequence of the omissions in the writ already adverted to. But, in that case, the order of commitment was made by a judge of " an inferior court of record," in pursuance of a special statutory authority. The rule in such cases is well established, and is clearly laid down by Baron Parke, in the case to which I have already alluded: " In the case of special authorities given by statutes to justices
" and others acting out of the ordinary course of the common
" law, the instruments by which they act, whether warrants
" of arrest, commitments, or orders or convictions, ought, ac-
" cording to the course of decision, to shew their authority on
" the face of them by direct averment, or reasonable intend-
" ment." *Ex parte* Kinning, therefore, has no important bearing upon the application now before me. It is deserving of remark that, notwithstanding the great care that has been devoted to this application, not a single english case has heen cited, nor have I been able to find any in which a person arrested under civil process issued by a Superior Court in the exercise of its general jurisdiction, was liberated by *habeas corpus*; and it is obvious that if that were the proper remedy, its application would have been a matter of frequent occurrence.

The authorities, moreover, clearly establish that the regularity of the proceeding of a Superior Court will not be inquired into by another court under a writ of *habeas corpus*. In the case *Ex parte* Andrew, a prisoner in custody, under process of the Court of Chancery, applied to the Court of Common Pleas to be discharged upon a *habeas*; judge Coleman observed: "This court has no power to enter into an inquiry as to the regularity of process issuing out of the Court of Chancery," and judge Cresswell added: "The Court of Chancery had undoubted authority to issue the writ, and it is equally beyond doubt that we have no authority to inquire whether it has been issued regularly or not." And, in Cobbett's case, Lord Denman, upon an application for a writ of *habeas corpus*, and speaking of the Court of Exchequer, observed "if the process of that court has been abused, that court alone can set it aside." This is also the doctrine of the french law, as shewn by the passage from Fournel, cited at the argument: "*Le tribunal civil du département dans le ressort duquel la contrainte a été exécutée est seul compétent pour connaître de la demande du détenu à fin d'élargissement fondée sur les moyens de nullité dans l'exécution.*" Fournel, *Traité de la contrainte*, 165, 208, 212. I find also that the Supreme Court of the United States, in the case *Ex parte* Wilson, 6 Cranch, 52, refused to allow a writ of *habeas corpus*, where the person was in custody on a *ca. sa.*, being of opinion that it was not the proper remedy in a case of arrest under civil process; (1) and, in the *Bank of the United States* vs. *Jenkins*, it was held that "a writ of *habeas corpus* is not the proper remedy for a Defendant imprisoned upon a writ of *ca. sa.*, irregularly issued, but that the party should apply to the court on motion and affidavit for the purpose." This doctrine was acted upon by the Superior Court, at Quebec, on the application of one McCulloch to be released by *habeas corpus* from confinement under a writ of *contrainte par corps* which had issued from the Circuit Court. That application having been rejected, by the Superior Court, on the ground that the party was confined under civil process, was renewed before Mr. Justice Panet, and rejected by him. It is true that the application was afterwards submitted to judge Taschereau, who granted it, one of his reasons, however for doing so, being, that, in his opinion, the commitment was defective for want of jurisdiction in the judge who granted it; so that, even this decision, in principle, can hardly be deemed in conflict with the authorities which I have cited. See also the decision of Mr. Justice Smith, 6 R. J. R. Q., p. 212. There is another case which, although

(1) 18 Johnson's Rep., p. 309.

not cited at the argument, may be supposed to have some bearing upon the application now before us, it is the case of *Desharnais* vs. *Amiot dit Bocage*, (1) in which Mr. Justice Aylwin liberated the Defendant from custody under a *contrainte par corps*, on the ground that the writ did not state the amount of the costs of commitment and conveying the prisoner to jail. According to the english authorities that is a good ground for declaring the commitment of a justice, or of a justice of the peace, illegal, but I would hardly deem myself justified in extending that doctrine even to an inferior civil court; and I am clearly of opinion that it is not applicable to writs of *contrainte par corps* issuing from the Superior Court, in which, as a matter of practice, the amount of the costs to be incurred in the execution of the writ is never mentioned. No one can be more unwilling than I am to place any improper restriction upon the use of a remedy so useful and so justly prized as the writ of *habeas corpus*, but that writ, however valuable it may be, must not be so used as to interrupt and frustrate the due course of justice. It must be recollected that Plaintiffs have rights as well as Defendants, and very grave injustice might be caused to Plaintiffs, if a single judge, in chambers, under a writ of *habeas corpus*, and without any appeal from his judgment, could deprive a Plaintiff of his remedy for a debt, whatever might be the amount of it. Mr. Justice Duval very justly remarked, upon the occasion of the application made to him by the present Petitioner, "it would be most inconvenient, subversive of authority, if a judge in chambers could, by *habeas corpus*, exercise supervision over the highest courts in the country." And, as corroborating this view, I may quote a passage from the judgment rendered by Chief Justice Gibson, in the case of the *Commonwealth* vs. *Leckey*, 1 Watts, 66. That learned judge, after adverting to the rule that a *habeas corpus* is not the remedy for a Defendant imprisoned on a *capias ad satisfaciendum* issued irregularly, the proper course being an application to the court from which it has issued, observed "any other rule "would present some curious judicial phenomena. By an in-"version of their functions, a single judge, in vacation, and, "perhaps of an inferior court, would be legally competent to "rejudge the judgment of the highest tribunals of the land; "and the Supreme Court of the State, instead of proceeding "systematically in the correction of errors would be called "upon to produce its results by a new and shorter process; "while, in the guise of writs of *habeas corpus*, it would be "flooded with appeals from the decisions of other courts on

(1) 4 *R. J. R. Q.*, p. 59.

" question of bail. The rule is, therefore, absolutely necessary " to prevent judicial proceedings from running into a state of " incurable disorder." Upon the whole, it appears to me that, although the writ of execution in this cause is not perfectly regular, yet that it certainly is not void; and, therefore, that, as a judge in vacation, I cannot, by writ of *habeas corpus*, liberate the Petitioner from the custody of the sheriff.

The application was again renewed before STUART, A., Assist-Judge, also IN CHAMBERS, when GUGY, for Plaintiff, contended, that it was not fitting and proper for a Defendant to repent the application before every judge in Lower Canada, that it would be exceedingly unjust to permit a Defendant to drag a Plaintiff, day after day, before every judge in the Province, to resist an application for *habeas corpus*, seeing that, by the tariff, no fees were granted in such cases; besides, it would have the effect of bringing the administration of justice into contempt, were a judge to set aside the decision of his *confrères* in a matter so important as that involved in the present application; that, in England judges studiously avoided such a course, and refused to entertain applications of this description, when once pronounced upon by a brother judge. (1)

DUGGAN, for Defendant, admitted that the application was the same, and said, that it was expressly to secure the rights of Defendants to have the opinion of all the judges on a matter so important as that in which personal liberty was involved, that the statute imposed a penalty on judges refusing to entertain the application was enacted, (2) and that, consequently, Defendant had a perfect right to renew his application as often as there were judges to entertain and decide upon it.

ROSS, Q. C., said, that the authority referred to by the counsel for Plaintiff, had no application to the present case, as that was a renewal of the same application, before the same court, and the court very properly refused to entertain a second argument upon the same case, but this was an application before a different judge; that it was always the opinion of Chief-Justices SEWELL and STUART, that the application for *habeas corpus* could be renewed before all the judges, one after another, and referred to a case where an application of this kind had been made to the court composed of three judges two of whom were opposed to the granting of it, and the third Judge BEDARD) was of opinion that it ought to be granted, and SEWELL, Chief-Justice, said, that, inasmuch as one judge was in favor of it, it ought to be granted, and it was granted

(1) *Ex parte* Cobbett, 69 English Com. L. Reports, p. 180.

(2) 24 Geo. III, cap. 1, sec. 10.

accordingly; he also referred to Judge TASCHEREAU'S decision in McCullock's case, cited above.

STUART, Assist.-Judge: I have given the subject a good deal of consideration, and I am of opinion that I ought not to entertain it; not exactly that I have not the right, but on the ground that it would be inconsistent with judicial comity to do so, after two of the judges of a superior tribunal have rejected it. My impression is that the proper interpretation to be put upon the first section of the 52 Geo. III, cap. 8, is (1) that the party confined in gaol, shall have the right to apply to any one judge he may elect to go before, but once having made his election of a judge, he must abide by his decision, and cannot run from one to another, till he gets a decision in his favor; besides, the judge, by this section, is only bound to grant it, if it appears to him that there is a probable and reasonable ground of complaint, and it certainly cannot presume that there is a reasonable or probable ground of complaint, seeing that two judges have already decided against it. I cannot therefore entertain the application; but I have no objection, if Defendant desire it, to allow him to withdraw it, so that if he should be desirous of renewing it before another judge, my decision not being finally rendered, may not be cited against him. (Ross: We will withdraw the application.) It was accordingly withdrawn. The Defendant, however, abandoned his intention of renewing the application before another judge in vacation, and waited till the ensuing term of the Superior Court, in the month of June following, when he was discharged out of custody on motion (9 *D. T. B. C.*, p. 285).

GUGY, for Plaintiff.

DUGGAN, for Defendant.

DUNBAR ROSS, Q. C., Counsel for Defendant.

PROCEDURE.—DECLARATION.—JUGEMENT.

QUEEN'S BENCH, APPEAL SIDE, Québec, 7 mai 1861.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

GUGY, Appellant, *and* DONAGHUE, Respondent.

Jugé: 1° Qu'il n'est pas nécessaire que la déclaration annexée au writ contienne le domicile et les qualités des parties (2).

(1) This section enacts: "That any one of His Majesty's Justices upon complaint made to him on behalf of any person confined or detained, if it shall appear by affidavit that there is a reasonable or probable ground for such complaint, to award a writ of *habeas corpus ad subjiciendum*, &c.

(2) V. art. 49 et 50 C. P. C.

2° Que, dans l'espèce, le Demandeur avait encore son domicile dans la cité de Québec.

3° Qu'il n'est pas absolument nécessaire, quoique désirable, que le jugement soit rendu par le juge qui a entendu les témoignages; cette matière ayant été laissée à la discrétion des juges siégeant en Cour Supérieure (1).

MONDELET, Justice: The Appellant complains of a judgment of the Superior Court for Quebec, whereby his *exception à la forme* was dismissed, on the 4th February, 1860. The grounds of the *exception à la forme*, are: 1° That, in the declaration annexed to the writ, the domicile and addition of the parties is not contained. I am of opinion that we have no right to distinguish between the cases of the Superior and the Circuit Court as to the necessity of the parties having their domicile and addition described in the declaration (2). It is fatal: the *exception à la forme* ought to have been maintained. 2° Plaintiff is styled as " of the city of Quebec, in the county of Quebec, printer." Now there is no city of Quebec, in the county of Quebec. Whatever may be said or thought of that objection in other respects, it is not the less a valid one, and one which should have been maintained. 3° Plaintiff is described as of the city of Quebec, whereas, at the time of the suing out of the writ, and for a long time before, Plaintiff had no *domicile* in Lower Canada, but, on the contrary, had his domicile in the city of New York. It is proved that, long before and at the time of the issuing of the writ, Plaintiff had his domicile in the city of New York. If so, he could not, at the same time, have a domicile in the city of Quebec, he could have only one domicile. There again the Defendant was right and should have succeeded. 4° No adjudication upon the Defendant's motion for a *commission rogatoire*. This objection is fatal, a judgment by the ordinances is null, and is even open to the *requête civile*, when essential proceedings have not been adjudicated upon. The motion of the 9th of January was continued to the 2nd of February, and never was adjudicated upon. It is not because Defendant did not, at any stage of the proceedings, produce and file his interrogatories, that the omission by the court to adjudicate upon the motion, is or can be said to be regularised, cured or legalized, it remains there a fatal omission. Nor can it be said that it is a waiver of the objection; it can never be twisted into such a forced construction of an intention to waive such a formidable objection. 5° Motion for order to witnesses to retire. I am not certain that this is fatal. It certainly should be. 6° Judgment not rendered by the judge who heard the

(1) V. art. 468 C. P. C.

(2) Ordonnance 1667, art. 2, tit. 2 (Des ajournements).

witnesses. The law should be so, but is it not clearly enough so to justify the Court of Appeals to say it is. There are several reasons in the *exception à la forme*, which ought to have been pleaded by a *défense au fonds en droit*, but Plaintiff has not said a word about that. I am decidedly of opinion that the judgment of the court below should be reversed, there being more than " purely imaginary " matters in Defendant's *exception à la forme.*

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef : Action en dommages, à raison d'emprisonnement illégal. Le bref de sommation contient la qualité et le domicile des parties, mais la déclaration n'en fait pas mention. Le Demandeur est désigné dans le bref, comme étant domicilié dans la cité de Québec, comté de Québec. Exception à la forme, à l'appui de laquelle le Défendeur allègue plusieurs raisons plus ou moins valables les unes que les autres. On pourrait peut-être soutenir que la dernière raison alléguée paraît être bonne et suffit pour faire débouter le Demandeur de sa présente action, si, nonobstant la mention du domicile du Demandeur dans le bref de sommation, il est encore nécessaire que ce domicile soit indiqué dans la déclaration. La *déclaration* a été substituée à la requête de l'ancien droit français ; mais elle n'en est pas moins pour cela la partie principale de l'ajournement et de la citation. C'est elle qui contient le *libellé*, les conclusions et les moyens de la demande, aux termes de l'ordonnance de 1667, titre 2, art. 1, et qui, de même doit contenir ce qui est exigé par l'article 2, et qui est encore applicable en ce pays, elle devrait donc faire mention du " domicile et de la qualité de la partie." Mais, en admettant même que la mention qui en est faite au bref de sommation devra être regardée comme remplissant le vœu de l'ordonnance, l'exception à la forme sous ce rapport est fatale au Demandeur. Car il est prouvé, qu'au temps de l'action, le Demandeur n'avait pas de domicile dans la cité de Québec, qu'il n'y résidait pas, qu'au contraire, il résidait à New-York. Cela a été admis par son avocat dans le cours du procès, et l'admission a été couchée dans les registres de la cour. Si l'on prétend que cette admission ne doit se rapporter qu'à l'époque où elle fut faite, cette prétention ne pourrait pas tenir en présence de ce qui a eu lieu antérieurement dans la cause. Le 7 novembre 1859, le Défendeur fait motion que le Demandeur soit tenu de donner caution pour les dépens, attendu, dit cette motion, qu'au temps où l'action a été intentée, le Demandeur n'avait pas de domicile dans le Bas-Canada, et en était alors absent, *nisi causâ*, le 1er décembre suivant. Ce jour-là, l'audition sur cette motion est remise au 5. Le 5, les parties sont entendues et la motion est prise en délibéré. Puis le 6, la *règle* est déclarée *absolue* " no cause

being shown against the said rule," c'est-à-dire, que les allégations de la motion n'ayant pas été contredites par le Demandeur, elles sont prises par la cour pour affirmées, et, en conséquence, le Demandeur est obligé de donner caution, ce qu'il fait le 14 du même mois, et la preuve faite plus tard vient appuyer les allégations de la motion.

MEREDITH, Justice : The practice, in the Superior Court, has been to give the domicile and addition of the parties, as well in the declaration, as in the writ; but the practice in the Circuit Court, even in appealable cases, is otherwise; and the practice of the latter court seems to me to be the more reasonable of the two; for the writ, which contains the addition and domicile of both the parties, is part of the *exploit*, and I can see no advantage in giving the domicile and addition of the parties, twice in the same *exploit*. I, therefore, think, that, under our system, the objection now being considered was rightly overruled. The second of the grounds relied on by Appellant was that, in the writ, Plaintiff is styled "of the city of Quebec, in the county of Quebec, printer," whereas no city of Quebec can be found in the county of Quebec. The city of Quebec, strictly speaking, is not now in the county of Quebec; but, as this inaccurracy could not possibly mislead Defendant, or any person, I do not think it ought to be held fatal. The third of the grounds argued by Appellant was, that Plaintiff is described in the writ and declaration as having his domicile in Quebec; whereas, at the time of the suing out of the writ, and for a long time before, Plaintiff had no domicile in Lower Canada; but, on the contrary, had his domicile in the city of New-York. It is upon this point that the chief difference of opinion exists between the judges, and this is, certainly, the part of the case which has presented the greatest difficulty to my mind. The witnesses for Plaintiff establish that, for a period of about eighteen years immediately preceding the institution of the present action, Plaintiff had his domicile in this city; and it is proved that, at the time of the institution of this action, he was the tenant of a house in this city, in which his father, mother and sister resided. On the part of Defendant, it is indisputably established that Plaintiff resided in the city of New-York at the time of the institution of the present action, and that he had been resident there for a period of about four months before that time.

In considering the evidence, as to this part of the case, we are to bear in mind that, under the ordinance of 1667, it is the Plaintiff's domicile, and not merely his residence that is to be given in the *exploit;* and also that, in order to acquire a domicile two things are required, firstly, residence and secondly, an intention of making that residence the home

of the party " for it is not the mere act of inhabitancy in a place, which makes it the domicile, but it is the fact of inhabitancy coupled with the intention of remaining there *animo manendi.* (1) Now, when it is recollected that Plaintiff had, on several former occasions, left this city for months together, and afterwards returned; and that, at the time of the institution of this action, he was a tenant of a house in this city, it seems to me we could not be justified in saying that the Plaintiff, by living four months in New-York, had lost his domicile here, and acquired a domicile in that city. If, between the suing out and return of the writ in this cause Plaintiff had married and died at New-York, it would hardly be contended that we would be justified in holding, upon evidence such as that in this record, that the mobiliary estate of Plaintiff, and the matrimonial rights of his widow, should be regulated by the laws of the state of New-York, and, yet, if Plaintiff had not then acquired a domicile at New-York for those purposes, I do not see that, in the writ before us, he was bound to mention New-York as his domicile. If this view be correct, then Plaintiff was rightly described in the writ before us as of Quebec, because a domicile once acquired is retained until a new one is acquired. For these reasons, I think that the judgment of the court below is right as to the point under consideration. At least, the weight of evidence is not so clearly against it as to justify us in reversing the judgment of the court below; and that, for the purpose of maintaining an *exception à la forme* which, it seems to me, might very well have been dispensed with.

The Appellant also complains that his exception was dismissed, without any adjudication upon his motion for a *commission rogatoire.* The motion for the *commission rogatoire* was made on the 9th of January; and, on the same day, Defendant having been heard on his motion, the court ordered " that the said motion be, and the same is hereby continued " to the 2nd day of February next." The entry on the second of February is simply: " The parties respectively having been " heard upon the merits of the *exception péremptoire à la* " *forme* in this cause filed, *curia advisare vult.*" On the 4th February, judgment was rendered dismissing the exception as to form; and, on the same day, Appellant filed a declaration, excepting " to the order of this day dismissing his *exception à* " *la forme.*" It is to be observed that Defendant did not, at any stage of the proceedings, produce the interrogatories upon which he desired to examine Plaintiff. The Plaintiff's counsel, by indicating, on the 9th of January, the residence of his

(1) Story's, *Conflict of laws*, n° 44, and authorities there cited.

client, may, I think, be regarded as having waived the objection, which he otherwise might have urged, against the granting of Defendant's motion, on the ground that the motion was not supported by an affidavit. Defendant, however, was then bound to proceed so as not to retard Plaintiff unnecessarily, and I, therefore, think he ought to have produced his interrogatories on the 2nd of February, and then prayed for the allowance of his motion of the 9th of January, asking for a *commission rogatoire.* Instead of this, the parties, on the 2nd February, appear to have been heard on the merits of the exception, *without any objection on either side:* and, under these circumstances, I think Defendant must be considered as having abandoned his application for a *commission rogatoire.* That he should have done so, does not appear to me surprising; for, from the nature of the case, and of the evidence, it seems more than probable that the suing out of a commission, could have had no other effect than to cause some delay, at great cost to Defendant.

Passing now to the other ground of complaint urged by Defendant, namely, that the judgment upon the merits of the exception was not rendered by the same judge who heard the witnesses give their evidence; it is obviously desirable that, in the court below, when practicable, the judgment should be rendered by the judge who hears the evidence. Owing however to the nature of the duties which devolve upon the judges of the Superior Court, and to the number of courts they have to hold, as well where they reside, as on circuit, a strict adherence to the above rule would, in many cases, be attended with vexatious delays and much additional expense. The legislature have in consequence left this matter to the discretion of the judges holding the Superior Court; and with the exercise of the discretionary power thus given we cannot interfere. (1) Upon the whole, although the case is not free from difficulty I think the judgment of the court below ought to be confirmed. (11 *D. T. B. C.*, p. 421.)

GUGY, for Appellant.

DUGGAN, W. E., for Respondent.

(1) See as to exercise of discretionary powers, 5 *L. C. R.*, p. 38.

OBTENTION D'ARGENT SOUS DE FAUX PRETEXTES.

QUEEN'S BENCH, Quebec, 17th June, 1859.

Before AYLWIN, DUVAL, MEREDITH and C. MONDELET, Justices.

REGINA *vs.* ROBINSON.

Dans le cas où un prisonnier qui avait été renvoyé du service de A se rendit au magasin de O et S se représentant comme encore au service de A demanda des effets au nom de A, lesquels furent envoyés par O et S au domicile de A, où le prisonnier s'était déjà rendu, et aussitôt que les effets furent livrés au domicile de A, il les prit des mains du domestique, disant : "Ceci est pour moi, je m'en vais voir A ;" mais au lieu de se rendre auprès de A sortit de la maison avec les effets.

Jugé : Que le prisonnier avait été légalement convaincu de l'accusation portée contre lui en vertu des 4e et 5e Vict., ch. 25, s. 45, d'avoir obtenu des effets de O et S sous de faux prétextes. (1)

The prisoner was tried and convicted before J. Maguire, chairman of the Court of General Quarter Sessions, in and for the district of Quebec, at the April term, in the year 1859, upon an indictment under the provincial statute 4th and 5th Vict., ch. 25, s. 45, for having wilfully, knowingly and designedly by false pretenses, obtained goods from Orkney and Simmons. It was proved that the prisoner went to the shop of James F. Orkney and John Simmons, dry goods merchants and partners, in the city of Quebec, and stated that her mistress, Miss Atkins, had sent her for four yards of unbleached cotton, and one yard of shirting which were to be charged to Miss Atkins' account. Mr. Orkney told her the goods would be sent up. The prisoner then left the shop, and in a short time, Orkney and Simmons sent the four yards of unbleached cotton and one yard of shirting, worth two shilling and four pence, or two shillings and six pence, to Miss Atkins' house, by a young man in their employ, who delivered the goods in a parcel to Ann Lamb, Miss Atkins' servant. The prisoner, after leaving Orkney and Simmons' shop, went to Miss Atkins' house, and sat down in the kitchen, saying to Ann Lamb, the servant, that she would wait a while, that she wanted to see Miss Atkins, and, as soon as Ann Lamb had received the parcel containing the goods, the prisoner said : "This is for me." Prisoner then walked into the passage leading to Miss Atkins' room, saying she was going to see Miss Atkins, but, instead of doing so, she walked out, and left the house, taking the goods with her. Prisoner previously had been, but was not then the servant of Miss Atkins, and had received no authority from Miss Atkins to ask for, or obtain the goods, and Miss Atkins was in the habit of making purchases at the

(1) V. art. 358 Code Criminel.

store of Orkney and Simmons, and had an account with them. The jury found the prisoner guilty.

WILLAN, of counsel for the prisoner, objected that the conviction was bad, because, although the evidence might warrant a conviction for larceny from the person of Ann Lamb, if the prisoner had been indicted for such offence, or a conviction for attempting to obtain the goods under false pretenses, the evidence wholly failed to sustain the charge of obtaining the goods under false pretenses from Orkney and Simmons ; and, on his application, sentence was respited, in order that the opinion of the judges of this court might be taken upon the objection.

No one appeared in the Court of Queen's Bench, on behalf of the prosecution. WILLAN argued for the prisoner, that the conviction was bad, inasmuch as the charge, as laid in the indictment, was not proved, as Orkney and Simmons had parted completely with the goods and the possession thereof to a third party, and that, consequently, the offence did not come within the statute upon which the indictment was framed. (1) That, in larceny by stealing from the person, an actual and not merely a constructive asportation must be proved. (2) In robbery, the force must not be subsequent, here the *pretence* must not be subsequent. (3) It must appear that the prosecutor parted with his goods by reason of the false pretence ; (4) here it was not so, as the clerk of Orkney and Simmons, and, consequently, Orkney and Simmons, themselves through their clerk or agent, parted with them voluntarily, and without any pretence whatever on the part of the prisoner, the goods, on the contrary, having been handed by their clerk or agent to Ann Lamb, and not to the prisoner ; that this would probably warrant a conviction against the prisoner for having obtained the goods under false pretences from Ann Lamb, as in snatching them from her, she said they were for her, but it did not substantiate the charge laid in the indictment of having obtained them under false pretences from Orkney and Simmons. That it was not only necessary to set forth the pretence, but it must be set forth with clear and sufficient certainty (5) and it was consequently necessary to prove the pretence as laid, which had not been done in the present case, as it was proved that no pretence whatever was

(1) Roscoe, p. 427.

(2) 1 Archbold's *Criminal Law*, pp. 262 and 254.

(3) Ibid., pp. 182 and 295.

(4) Archbold's Pleading and Evidence, pp, 287, 288, 289 *et seq.*

(5) Ibid., p. 289.

made by the prisoner to the clerk or agent of Orkney and Simmons, and consequently not to Orkney and Simmons themselves, at the time they parted with the goods, nor did they therefore part with the goods by the false pretences of the prisoner, which it was necessary to establish in order to support the prosecution. To prevent the case from amounting to larceny the delivery of the goods must be by some person having authority to pass the property, (1) which had not been proved in the case. That the variance between the proof and the statement of the false pretence was fatal. (2) That it must be proved that the prisoner obtained the goods by the false pretence and by it only, (3) and the contrary of this was proved.

MONDELET, C., Justice: I have to dissent from the judgment of the court. From the facts, two questions arise; firstly, was there an obtaining of goods from Orkney and Simmons under false pretences? secondly, (and this second question properly subdivides itself into four questions), was the snatching from Ann Lamb a continuation of the act of obtaining from Orkney and Simmons; or an obtaining under false pretences from Ann Lamb; or a larceny from Orkney and Simmons; or a larceny from Ann Lamb? but into this last question I need not inquire, because, if admitted, the statute upon which the indictment is framed, would not apply, inasmuch as, by the statute, a false pretence must be shewn. I hold also, that it was not a larceny from Orkney and Simmons under the statute, and therefore, it does not apply; but it may be pretended, in favor of the verdict, that there was an obtaining under false pretences from them, but, in my opinion, this view is not sustained by the evidence; there can be no doubt, that there was an attempt to do this, but, I do not think it was carried out, inasmuch as the parcel was sent to Miss Atkins, and came into her possession, however short her possession may have been, or into the possession of Ann Lamb, however short it may have been; but, it is said Orkney and Simmons never lost the legal possession, but this question I will not inquire into, for it is perfectly clear they lost the physical possession of them, and I am not fully satisfied that Miss Atkins had not the actual possession of them, but I am sure that, at all events, Ann Lamb had the actual possession of them for a while; and, therefore, it was a larceny either from Miss Atkins or from Ann Lamb, and in such case, as I have already stated, the statute will not apply,

(1) 1 Roscoe on Evidence, p. 427.

(2) 4 Archbold's Justice of the Peace, p. 225; 1 Archbold's Criminal Law, p. 470.

(3) 1 Archbold's Criminal Law, p. 471.

there being no false pretence. But admitting, for the sake of argument, that she preceded the snatching from Ann Lamb, by saying (of which circumstance I am not quite sure). "This is for me," even supposing this were, or were not, an obtaining from Ann Lamb, under false pretence, or whether it was a snatching from her, in either case, it is the same, so far as the conviction is concerned, because, in either case, it was not an obtaining from Orkney and Simmons, and could not be construed into a larceny from them. As to the observation made during the argument, that the point made in this case was a subtlety, it suffices to say, that all legal objections could be ranged in the same category. There can be no depreciation of the respect due to the administration of criminal justice, resulting from a strict adherence to law; whereas, all confidence in the administration of criminal justice would be lost, if it turned our that the accused, instead of being protected by well defined and well applied rules of law, were surrendered to the individual opinion of each judge as to what constitutes substantial justice, such individual opinion being substituted for forms which have endured for centuries in England, the country, *par excellence*, where criminal justice is well administered. The general disregard, in England, authorised by statutes, of technicalities, cannot be applied here to other cases than those provided for by our own laws. The verdict, therefore, I consider, should be set aside.

MEREDITH, Justice: The goods in question were already the property of Orkney and Simmons when Defendant obtained possession of them; Ann Lamb, at that time, had the mere custody of those goods, and not a right to the possession; and, as to Miss Atkins, she had no right whatever in relation to them. Therefore, whether Defendant got the goods by larceny or by false pretences, they were properly described in the indictment as the goods and chattels of Orkney and Simmons. If Defendant obtained the goods by false pretences, the conviction is good independently of the statute; if, on the contrary, she obtained them by larceny, then she has been rightly convicted under the statute which declares, "That, if upon "the trial of any person indicted for such misdemeanor, it "shall be proved that she obtained the property in question "*in any such manner as to amount in law to larceny*, he "shall not by reason thereof be entitled to be acquitted of "such misdemeanor; and no such indictment shall be remove-"able by certiorari, and no person tried for such misdemeanor "shall be liable to be afterwards prosecuted for larceny upon "the same facts." 4 and 5 Vic., c. 25, s. 45. Mr. William has contended that the provisions of this statute were not applicable, because, if there was a larceny in the case, it was not a

simple larceny, but a laceny from the person. But the words of the law which have just been quoted do not distinguish between one kind of larceny and another, and we cannot make a distinction that the law has not made.

DUVAL, Justice : The object of the statute was, as it is quite apparent by the preamble, to put an end to subtle distinction, so that substantial justice should be administered, and this is what has been attained by the verdict which has been rendered against the prisoner. I maintain that there was a larceny ; to constitute this, reference must be had to the *animus furandi ;* this was first shewn by the prisoner, not in the house of Miss Atkins, but in the store of Orkney and Simmons, and Orkney and Simmons parted with their goods willingly upon her false pretences. Ann Lamb was no more the servant of Miss Atkins than she was the servant of Orkney and Simmons, the goods in her hands were *in transitu,* the property had not passed from Orkney and Simmons. Now take this case, suppose the goods had been burnt, would not the loss have fallen on Orkney and Simmons as *res perit domino,* Ann Lamb being merely the bailee of Orkney and Simmons, and Miss Atkins could have repudiated the whole circumstance of delivery, and say that Ann Lamb did not receive them for her ; and therefore the view I take of it is, that Ann Lamb was in such case the servant or bailee of Orkney and Simmons, there was, therefore, an obtaining of goods under false pretences from Orkney and Simmons. I am therefore of opinion that the subtleties which have been raised should be set aside, and I hold the conviction right.

AYLWIN, Justice: I believe we are all agreed upon one point, this is, that there was no larceny from Ann Lamb. Then as to the subtlety endeavoured to be established by shewing the distinction between larceny of one kind, and larceny of another kind, it is sufficiently and succinctly answered by the statute itself, which says, " any act in any manner amounting to a larceny." Then Ann Lamb was not the agent of Miss Atkins, because she had no authority from her to receive the goods, they merely came into her hands accidentally. The case appears to me exceedingly simple and does not justify all the difficulty which it appears to have occasioned. The judgment of this court, therefore, is, that the conviction is right, and the magistrate is ordered to pass sentence. (9. *D. T. B. C.*, p. 278.)

ENREGISTREMENT.

COUR SUPÉRIEURE, Québec, 14 juin 1859.

Présent : CHABOT, Juge.

LENFESTY, Demandeur, *vs.* RENAUD, Défendeur, *et* ALAIN, Opposant, *et* BILODEAU, Opposant.

Jugé : Que lorsque les certificats d'un régistrateur établissent que deux actes ont été enregistrés le même jour et à la même heure, et qu'il donne à l'un de ces actes préséance par numéro, les réclamations fondées sur ces actes devront, sous les dispositions de la 4e Vic., ch. 30, sec. 11, être colloquées concurremment par l'ordre de distribution (1).

Alain, un des Opposants, contesta la collocation de Bilodeau, en autant qu'il paraissait par les certificats du régistrateur du comté où était situé l'immeuble sur lequel les deux Opposants avaient des hypothèques, que les deux actes sur lesquels étaient fondées leurs hypothèques respectives, avaient été enregistrés le même jour et à la même heure, et qu'en conséquence lui, Bilodeau, ne pouvait pas lui être colloqué en préférence. Par les certificats du régistrateur, il paraissait que les deux actes en question avaient été enregistrés à deux heures après midi, le douze de juillet 1855, et qu'à l'acte de Bilodeau le régistrateur avait donné préférence de numéro, en lui donnant le numéro 4993 ; et à celui d'Alain, le numéro 4994. Par le rapport de distribution, le protonotaire avait donné préférence à l'acte de Bilodeau qui avait priorité de numéro ; et c'était sur cette collocation, que la contestation avait lieu.

CHABOT, Juge : La cour est d'opinion que les créances des deux Opposants devraient être colloquées concurremment, car, autrement le régistrateur aurait le pouvoir, en donnant préférence de numéro, d'ôter ou de donner aux parties des préférences hypothécaires ; et il n'appartient pas au régistrateur d'établir les droits des parties. La loi demande que l'heure soit mentionnée dans le certificat (2) ; et c'est cette circonstance qui règle les droits des parties ; ici, les deux actes d'après les certificats du régistrateur, ont été enregistrés à la même heure ; et, en conséquence les deux Opposants devraient être colloqués concurremment. Contestation maintenue. (9 *D. T. B. C.*, p. 298.)

TESSIER et ROSS, pour les Opposants.

(1) V. art. 2083 C. C.
(2) 4 Vic., cap. 30, sec. 11.

BILLETS PROMISSOIRES.—PREUVE.

COUR DE CIRCUIT, Québec, 20 mai 1859.

Présent : CHABOT, Juge.

JOSEPH et al. *vs.* HUTTON.

Jugé : Que dans le cas d'un endossement d'un billet promissoire par un agent, son agence doit être établie ; en autant que pareil cas n'est pas pourvu par les dispositions de la 20e Vic., cap. 44, sec. 87. (1)

L'action était portée sur un billet promissoire fait par le Défendeur en faveur de R. Warner ou ordre. Le billet avait été ensuite endossé comme suit : " R. Warner, par B. W. Warner," et livré aux Demandeurs. Dans la déclaration il était allégué que B. W. Warner était l'agent dûment autorisé de R. Warner.

DÉCHÈNE, pour le Défendeur, maintient que les allégués de déclaration n'étaient pas prouvés ; qu'il n'y avait aucune preuve que B. W. Warner était l'agent de R. Warner, et que conséquemment l'action devait être renvoyée.

SUZOR, pour les Demandeurs, maintient qu'il n'était pas nécessaire de prouver l'agence de B. W. Warner, d'après la 20e Vic., cap. 44, sec. 87 ; en autant que le Défendeur n'avait pas nié sa signature et filé un affidavit au soutien de telle dénégation.

CHABOT, Juge : L'action doit être renvoyée faute de preuve que B. W. Warner était l'agent de R. Warner, ou qu'il avait le pouvoir d'endosser le billet au nom de R. Warner. Le statut cité n'a aucune application au pouvoir d'un agent ; il est applicable seulement lorsqu'il s'agit d'une signature, quoiqu'il ne soit pas, aux termes du statut, nécessaire de prouver la signature de l'agent, il est néanmoins nécessaire de prouver que de fait il était l'agent de R. Warner ou qu'il avait le pouvoir d'endosser le billet. (9 *D. T. B. C.*, p. 299.)

SUZOR, pour le Demandeur.

PLAMONDON et DÉCHÈNE, pour le Défendeur.

(1) V. art. 1223 C. C. et art. 145 C. P. C.

VENTE.—GARANTIE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 13th June, 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice AYLWIN, DUVAL and MEREDITH, Justices.

DINNING, Appellant, and DOUGLASS, Respondent.

Jugé: Qu'un acquéreur en possession de la propriété acquise et jouissant des fruits et revenus d'icelle, et retenant le prix d'acquisition jusqu'à ce que son vendeur se soit conformé à un jugement ordonnant de faire disparaître certaines oppositions filées à une demande pour lettres de ratification, est tenu de payer à son vendeur l'intérêt sur le prix d'acquisition, à son échéance, nonobstant que ce dernier ait fait défaut de faire disparaître les oppositions ainsi qu'il le lui était enjoint par le jugement. (1)

The Respondent, brought his action for the sum of £450, being for the interest due in virtue of a deed of sale bearing date the 22nd October, 1855, whereby he sold Appellant, a property commonly known as "Mount Lilac" for the sum of £3,500; a part of which, to wit, £500, Appellant paid at the time of the passing of the deed, and the remaining balance of £3,000, he undertook to pay in the following manner; £500 on the 1st day of May then following, and the remaining £2,500 in four years from the date of the deed of sale, with interest, payable half-yearly. Not having paid any portion of the remaining £3,000, the Respondent brought his action, for two and a half years interest, due on the 29th April last. The Appellant pleaded, that, by the deed of sale, Respondent had guaranteed him from all *troubles*, debts and mortgages; that having sold a portion of the property to John H. Galbraith, the latter had demanded letters of ratification of title, against which two oppositions were filed, establishing that the property was hypothecated in favor of G. B. Hall and his wife, in the amount of £561 5 1, of which £269 12 9, was for sales of portions of the property previously to the sale by Plaintiff to Defendant; and the remaining £291 13 4, was for that sale; and for another sum of £2,000 founded on a certain bond therewith filed, in favor of James Jeffery: That Defendant having obtained permission to intervene in the cause, had obtained judgment condemning Plaintiff to intervene, to cause a cessation of the *troubles* proceeding from the two oppositions, and to take up the cause both of Henry Dinning, and of Galbraith; and, in default of so doing, to indemnify Dinning and Galbraith for the *demandes* contained in the oppositions, and for all judgments and all sums for which the Opposants might be collocated on the price of the sale made by

(1) V. art. 1535 C. C.

Dinning to Galbraith; and to indemnify Dinning for all costs and charges incurred by him with regard to the said two oppositions; and that he had not complied with the judgment, nor caused the oppositions to be removed, and that, until he did so, he could not recover any sum for principal or interest. The Respondent demurred to this plea, maintaining that it contained no sufficient reason to justify the dismissal of the action, and the court below maintained the demurrer; and from this judgment, the appeal was instituted.

IRVINE, for Appellant, argued that the court having already decided, by its judgment, in *ex parte* Galbraith, that oppositions filed in that cause coustituted a *trouble* against which Respondent was bound to guarantee Appellant, and having condemned him to do so, it was manifest that, until he had complied with the requirements of that judgment, he could have no action for the price of sale; and that the same argument would apply against any demand for the interest. The effect of the judgment appealed from virtually was to render nugatory the judgment previously rendered in *ex parte* Galbraith, and to prevent Appellant, by the acts of Respondent, from recovering either the principal or interest of the price of his sale to Galbraith, and to condemn him, at the same time, to pay Respondent the interest of a sum of money for which, at present, he could maintain no action.

BOSSÉ, pour l'Intimé, maintient qu'en admettant les prétentions de l'Appelant, il était clair que ce n'était pas par une exception péremptoire en droit temporaire qu'il pouvait les faire valoir, mais bien par une exception dilatoire, dont les conclusions auraient demandé que l'action du Demandeur fût suspendue, jusqu'à ce qu'il fût parvenu à lever les hypothèques dont ces deux oppositions demandaient la conservation; car l'Intimé admettait que la somme de £3000 était due, et qu'il était convenu d'en payer l'intérêt semi-annuellement, tel que demandé; il admettait donc que l'action existe, puisque le droit existe, mais, disait-il, vous ne pouvez exiger cet intérêt tant que vous n'aurez pas fait lever ces hypothèques; il fallait donc conclure à ce que l'action fût suspendue jusqu'à ce que les hypothèques fussent éteintes, sauf à statuer sur la question des frais; que la convention entre les parties obligeait Dinning à payer semi-annuellement l'intérêt de cette somme de £3000 0 0, et la loi n'était pas moins expresse que leur convention, elle veut que "*les intérêts du prix d'un immeuble soient dus de plein droit.*" (1) Que Galbraith n'avait pas déposé, et n'avait pris aucune procédure quelconque depuis

(1) Duvergier, p. 524, nos 421 and 422; Troplong, *Contrat de vente*, Edition de 1856, p. 6?, nos 598, 611 et 612; 6 Marcadé, pp. 287 et 288, art. 1653; 1 *Condensed Louisiana Reports*, pp. 116 and 117.

la production des oppositions de Hall et de Jeffery ; il n'avait obtenu aucune condamnation contre Dinning, et ce dernier recevait probablement les intérêts que lui devait Galbraith ; ces condamnations et ces collocations n'étaient qu'éventuelles, et tant que Dinning n'avait rien payé, il ne pouvait rien se faire rembourser par son garant. Il voulait se soustraire, non pas au paiement du capital, qui ne lui était pas demandé, mais au paiement des intérêts de ce capital ; suivant cette prétention il aurait ensemble et les intérêts de son prix d'acquisition, et les fruits et revenus de la propriété, et tout cela serait à cause de ces condamnations éventuelles à intervenir ; que, d'après son exception, il n'avait vendu qu'une partie de la propriété, il jouissait du reste sans trouble, et ne prétendait pas même qu'il existait une hypothèque sur cette partie de la dite propriété : comment pouvait-il donc dire qu'il ne devait rien, quant à présent ? Que l'exception n'alléguait pas que les deux Opposants demandaient des intérêts sur le prix de la partie que Dinning avait vendu à Galbraith, comment voulait-il les retenir sur le prix d'acquisition de toute la propriété ?

IRVINE, in reply, contended that the objection of Respondent as to the form of the plea, was made too late, that he ought to have urged it in the court below, even if it were well founded, but that it was not so, as an *exception temporaire* was the proper plea to urge the grounds of the Appellant's defence. That the authorities cited did not militate against his position in any way, as he did not deny that the interest of the purchase money was payable for the enjoyment of the property ; but what he maintained was (and this position the authorities cited did not contravene), that Douglass was not entitled to it, until he had removed the *troubles* or oppositions as he was bound by the judgment to do.

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef : Quant à la somme de £2000 réclamée par Jeffery, les énoncés de l'exception sont bien vagues, peut-être trop vagues pour que l'on puisse y voir l'invocation de l'existence d'une hypothèque. On se contente d'alléguer un certain cautionnement, sans dire si c'est un cautionnement reçu par devant notaires, sans même en énoncer la date, et sans dire par qui il a été consenti. Il peut se faire qu'il s'agisse d'un acte sous seing privé, qui sait. Quoi qu'il en soit, supposant même qu'il soit question d'un cautionnement emportant hypothèque, et qu'il ait été consenti par Douglass antérieurement à la vente qu'il a faite à Dinning, toujours est-il que ce cautionnement ne serait que d'une somme de £2000, et Dinning n'allègue pas que cette somme porte intérêt, non plus que celle ci-dessus de £269 12 9 due à Hall. Ces deux sommes, qui seules pourraient donner lieu au *trouble* auquel Dinning se dit exposé, forment une somme de

£2269 12 9. Et Dinning a encore entre les mains, sur son prix d'acquisition, une somme de £3000. De plus, lui et son acheteur jouissent des fruits et revenus des immeubles que Douglass a vendus. Il est vrai qu'il est troublé par les oppositions de Hall et Jeffery à raison d'hypothèques non déclarées au contrat, et que par conséquent, il peut séquestrer entre ses mains ou la totalité de la somme de £3000, ou seulement une partie de cette somme, équivalente aux chiffres des réclamations de Hall et Jeffery. Sans entrer dans cette dernière question qui, quoique plaidée à l'audience, n'est pas celle que présente l'état de la cause, qu'il suffise de dire qu'étant en possession des immeubles, jouissant des fruits et revenus, s'il peut retenir le prix de la vente, il doit au moins payer les intérêts ; l'ancien droit et le nouveau droit français s'accordent à imposer cette obligation à un acheteur placé, comme l'est Dinning vis-à-vis de son vendeur.

" Mais, en se dispensant de payer le prix," dit Troplong, *De la vente*, n° 611, l'acquéreur n'est pas moins obligé de servir les intérêts ; il profite de la vente ; il ne peut donc priver le vendeur des intérêts auxquels il a droit ; la loi a voulu tout simplement donner à l'acquéreur les moyens de pourvoir à sa sûreté par la séquestration du prix entre ses mains ; mais elle n'a pas voulu que ce fût pour lui une occasion de s'enrichir aux dépens du vendeur. L'acheteur ne peut donc empêcher les intérêts de courir qu'en consignant." Le jugement de la Cour Supérieure est, en conséquence, confirmé. (9 *D. T. B. C.*, p. 310.)

HOLT and IRVINE for Appellant.

BOSSÉ for Respondent.

PROMESSE DE VENTE.

BANC DE LA REINE, EN APPEL, Québec, 13 juin 1859.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL et MEREDITH, Juges.

GOSSELIN, Appelant, et LA COMPAGNIE DU GRAND TRONC DE CHEMIN DE FER DU CANADA, Intimée.

Jugé : 1° Qu'une promesse de vente suivie de possession, est équivalente à une vente absolue ; et une créance hypothécaire, contre le vendeur, créée subséquemment à telle promesse de vente, est de nul effet quant à la propriété vendue.

2° Que dans le cas où l'acquéreur porte une action contre un tiers, auquel il a revendu une portion de la propriété, tant comme propriétaire que comme procureur de son vendeur en vertu de telle promesse de vente, jugement sera rendu en sa faveur ; et le fait d'avoir vendu

comme procureur de son vendeur, ne pourra affecter son droit de réclamer comme propriétaire. (1)

L'action était portée pour le recouvrement de la somme de £450, prix d'un morceau ou lisière de terre que l'Appelant alléguait avoir vendu à l'Intimée, pour le passage de son chemin de fer. En vertu d'une promesse de vente consentie devant notaires, par Etienne Gosselin, le 3 août 1849, l'Appelant était entré en possession d'un lot de terre décrit dans la promesse de vente. Par cette promesse de vente, Etienne Gosselin et son épouse avaient promis et s'étaient obligés envers l'Appelant, à sa première demande, de signer et exécuter en sa faveur un bon et valable acte de vente du lot de terre ; et, en considération de la vente qui devait être ainsi exécutée, l'Appelant promit et s'obligea à payer diverses dettes dues par Etienne Gosselin ; cette promesse de vente fut enregistrée le 7 août 1849. Par acte passé devant notaires, 1er décembre 1854, l'Intimé fit l'acquisition d'une portion du lot de terre. Ce dernier acte était conçu en les termes suivants : "Fran-"çois Gosselin de la paroisse de Saint-Laurent, île d'Orléans, "dans le district de Québec, cultivateur, tant en son nom, "comme propriétaire du terrain ci-après vendu, en vertu "d'une promesse de vente à lui consentie par Etienne Gosse-"lin, maintenant à Chicago, dans les Etats-Unis d'Amérique, "charpentier, que comme procureur dûment fondé du dit "Etienne Gosselin, la dite procuration annexée à la minute "des présentes." Le prix stipulé était quatre cent cinquante louis courant. Les conditions de paiement étaient conçues dans les termes suivants : "Laquelle la dite somme de quatre "cent cinquante louis, la dite compagnie..... promet et s'o-"blige de payer..... aussitôt que le dit vendeur aura vérifié "qu'il n'existe aucune hypothèque ou cause d'éviction sur la "dite pièce ou portion de terre." Et c'était pour le recouvrement de cette somme de quatre cent cinquante louis que l'Appelant avait intentée l'action dans la Cour Inférieure. A l'appui de sa demande, le Demandeur produisit son acte de vente à la Défenderesse, la promesse de vente (son titre à la totalité de la propriété dont le terrain vendu formait partie) et un certificat du régistrateur constatant qu'au moment de la poursuite il n'existait aucune hypothèque sur le terrain en question, et aussi un acte de ratification de la vente à l'Intimée par Edouard Gosselin, agissant pour Etienne Gosselin, en date du 7 février 1855. L'Intimée prétendit que le Demandeur n'ayant qu'une promesse de vente du lot de terre, et n'ayant vendu qu'en qualité de procureur d'Etienne Gosselin, il ne pouvait pas porter l'action en son propre et privé nom ; que d'ailleurs, elle avait,

(1) V. art. 1478 C. C.

depuis son achat payé le prix total de la vente à ceux des créanciers du dit Etienne Gosselin qui avaient des hypothèques sur le terrain en question; qu'elle avait fait ces paiements à la demande et réquisition du Demandeur, avec son approbation et conformément aux stipulations de l'acte de vente; qu'entre autres créanciers qu'elle avait ainsi payés, se trouvait Horatio Nelson Patton, auquel elle avait payé la somme de £54 7 6, comme cessionnaire de Louis Fréchette. Ce paiement était le seul que l'Appelant contestait en Cour Inférieure. Cette créance de Patton provenait d'un jugement que Louis Fréchette avait obtenu contre Etienne Gosselin devant la Cour du Banc de la Reine, siégeant à Québec, le 22 octobre 1849, enregistrée le 25 novembre, 1854. L'Appelant admit par ses réponses sur *faits et acticles* qu'il avait donné son consentement aux paiements des dettes portant hypothèques sur le terrain en question, mais il nia positivement qu'il avait aucunement consenti aux paiements de la créance £54 7 6, due en vertu du jugement ci-haut mentionné, et dit que ce paiement avait été fait hors de sa connaissance.

La Cour Inférieure renvoya l'action du Demandeur. Ce jugement est dans les termes suivants: "Considérant qu'il est " dûment constaté par la preuve que la Défenderesse a, avant " l'institution de l'action, payé et acquitté les dettes mentionnées " en son exception; considérant que les susdites dettes étaient " les dettes de Etienne Gosselin ci-devant propriétaire de " l'immeuble vendu à la Défenderesse en vertu de l'acte de " vente du 1er décembre 1854, et sur lequel acte l'action du " Demandeur est fondée; considérant que ces dettes étaient " des dettes hypothécaires qui affectaient et hypothéquaient " le susdit immeuble, et que les titres créant icelle hypothèques " étaient dûment enregistrés où est situé le dit immeuble; " considérant que le Demandeur admet, par ses réponses aux " interrogatoires sur faits et articles, qu'il a consenti que les " dettes hypothécaires sur le dit immeuble fussent payées par la " Défenderesse; considérant que le Demandeur admet, par ses " dites réponses, que le dit Etienne Gosselin ne lui a jamais " consenti un acte de vente du susdit immeuble; considérant " qu'il résulte de la preuve que le Demandeur et Etienne " Gosselin n'ont jamais considéré la promesse de vente, en date " du 3 août 1849, comme équivalant à une vente, renvoie la " présente action." Et c'est de ce jugement qu'un appel fut institué.

Sir L. H. LaFontaine, Bart, Juge-en-Chef: Le 1er décembre 1854, le Demandeur vend à la compagnie du Grand-Tronc, un terrain situé à la Pointe Lévy, pour le prix de £450, stipulé payable," aussitôt que le vendeur aura vérifié qu'il n'existe aucune hypothèque ou cause d'éviction." Les conclusions de la

demande sont pour le paiement de cette somme, mais les parties s'accordent à dire que, dans le fait, il ne s'agit que d'une balance de £54 7 6. Le terrain en question faisait partie d'un emplacement que le Demandeur prétend avoir acquis de son frère Etienne Gosselin et sa femme, qui habitent maintenant aux Illinois. Le titre de cette acquisition est intitulé promesse de vente : il est du 3 août 1849, et a été enregistré le 7 du même mois. Toute la question est de savoir si cet acte a eu un effet translatif de propriété. Je n'hésite pas à me prononcer dans l'affirmative. Le prix a été déterminé, consistant dans le paiement à faire de certaines créances indiquées, et le Demandeur a pris possession en qualité de propriétaire. Or, c'est une jurisprudence bien établie qu'en pareil cas une telle promesse de vente équivaut à vente. Il est vrai qu'en vendant au Grand-Tronc, François Gosselin l'a fait en déclarant que c'était " tant en son nom comme propriétaire du terrain en vertu d'une promesse de vente à lui consentie par Etienne Gosselin, alors à Chicago, dans les Etats-Unis d'Amérique, que comme procureur dûment fondé du dit Etienne Gosselin." Cette qualité de procureur n'affaiblissait en rien son droit de propriété, qu'il affirme en premier lieu, et qui est reconnu par la compagnie dans son acte même d'acquisition : " de laquelle dite terre ou plus grande étendue de terre," y est-il dit," la dite partie de première part est en possession à titre de propriétaire par des titres bons et valables." La Défenderesse a payé des créances hypothécaires par l'entremise de Horatio Nelson Patton, son agent, de manière à réduire la balance du prix de vente à la somme de £54 7 6, la seule qui soit en contestation. Voici en quoi consiste la difficulté soulevée quant à cette somme. Le 23 octobre 1849, Louis Fréchette a obtenu un jugement contre Etienne Gosselin et trois autres individus, pour une somme de £58 10 4, avec intérêt du 18 août 1849, et les dépens. Fréchette en a fait un transport à Horatio N. Patton. L'Intimée invoque ce transport comme étant du 2 décembre 1854. Cette date est en effet écrite au dos du transport ; mais le corps de l'acte porte celle du 2 novembre 1854. Puis le 2 décembre 1854, Patton qui a les deniers entre les mains, se présente chez un notaire, y fait faire une quittance dans laquelle il déclare qu'il a reçu de la compagnie la somme de £54 7 6, en accompte de sa créance *hypothécaire,* et comme étant la balance que la Compagnie redevait sur son prix d'acquisition. C'est ce paiement que la Défenderesse cherche à faire valoir. Or, il n'y a pas d'hypothèque sur le terrain en question pour la sûreté de cette créance. Le jugement obtenu par Fréchette n'a été enregistré que le 25 novembre 1854, et son débiteur, Etienne Gosselin, avait cessé, dès le 3 août précédent, d'être *saisi et en possession* de l'immeuble. Dans ce cas, aux termes de l'ordonnance con-

cernant l'enregistrement des actes et procédures judiciaires, l'enregistrement du jugement de Fréchette n'a pu frapper d'hypothèque l'immeuble dont il s'agit ; et François Gosselin, ne s'étant pas obligé au paiement de ce jugement, ne doit pas être tenu de subir la déduction de la dite somme de £54 7 6. Tout considéré, je suis d'opinion que le jugement dont est appel doit être infirmé. Jugement de la Cour Inférieure infirmé. (9 *D. T. B. C.*, p. 315.)

CASAULT et LANGLOIS, pour l'Appelant.

LELIEVRE et ANGERS, pour l'Intimée.

NOVATION.—VENTE DE CREANCES.—GARANTIE.

SUPERIOR COURT, Montréal, 28 février 1859.

Before SMITH, Justice.

BOUDREAU et al. *vs.* D'AMOUR.

Le Défendeur transporta aux Demandeurs et à un nommé Brazeau, ses créanciers, certaines dettes dues à lui, le Défendeur, et les cessionnaires convinrent de lui donner une décharge en plein de leurs réclamations respectives, à la condition que les sommes transportées seraient payées à leur échéance, et non autrement, le Défendeur remit aux cessionnaires les titres de créance. Dans une action par les Demandeurs sur certains billets à eux consentis par le Défendeur avant le transport :

Jugé : 1° Qu'aucune novation n'avait été opérée au moyen du transport.

2° Qu'en autant que la matière était commerciale, une action en déchéance n'était pas nécessaire.

3° Que l'acte de Brazeau en donnant délai pour le paiement de l'une des créances transportées liait les Demandeurs, ses co-cessionnaires, et que chacun d'eux était responsable envers le Défendeur comme garant des actes des autres.

The action was brought by Plaintiffs, as copartners, under the firm of Boudreau, Hérard & Co., to recover £182 0 2, balance due upon six promissory notes all made and signed by Defendant in favor of Plaintiffs, amounting with interest to £340 6 3. The first note dated 26th February, 1856 ; the last on the 30th June, 1856, all the notes payable 3 months after date. To this action Defendant pleaded. That, by notarial act of 6th August, 1856, Defendant transferred, with *garantie de fournir et faire valoir*, to Plaintiffs and to François Brazeau, divers sums of money, to wit : to Plaintiffs £170 5 4, and to Brazeau, £168 8 6, and set up the condition given below (1).

(1) " Le présent transport est ainsi fait pour par le cédant demeurer quitte envers les cessionnaires de pareille somme de trois cent trente huit livres douze schellings et un denier, qu'il leur doit avec plus forte somme par billets et par comptes courant, avec cette condition, que les cessionnaires seront tenus, ainsi qu'ils s'y obligent expressément par ces présentes, dans le cas seulement, et non autrement où les sommes présentement, transportées leur seront régu-

The plea then set forth the acceptance by certain of the debtors of the *transport* as made, and the delivery of the *titres des créances* to the *cessionnaires*, and pleaded novation by reason thereof. The *second* plea alleged further, that Defendant was never notified of default having been made by any of the debtors to pay, or put *en demeure*, and, moreover, that Plaintiffs could not bring the present action, without first demanding *déchéance* of the rights acquired under the *transport*. The *third* plea alleged payment to the Plaintiffs of £199 8 10, by the debtors mentioned in the *transport*, and the consequent extinction of the Plaintiffs' claim. The *fourth* plea added that Plaintiffs had given delay of payment to 20th February, 1858, to one of the debtors for the balance of £25, due by him, that this sum was tendered on the 19th February, and a formal notarial offer and tender also made on the 5th March, 1858.

SMITH, Justice: This action is on notes made by Defendant in favor of Plaintiffs, and the Defendant's first plea sets up a subsequent transfer to Plaintiffs, and to one Brazeau, of certain debts due to Defendant under a condition that a discharge should be given to Defendant, if all the debts transferred were paid when they fell due. Hence, says Defendant, there is novation. But this pretension is manifestly unfounded. The second plea is, that no action lies on the notes until an action has been brought for *déchéance* of the rights obtained under the transfer, but the doctrine of the *déchéance*, in commercial matters, has long been exploded. The *third* plea of payment is not entirely made out, there being a small balance due, but the judgment will rest on the *fourth* plea, which is to the effect that delay was given by Brazeau, one of the *co-cessionnaires*, to Prud'homme, one of the debtors, for payment of part of one of the debts transferred. The Defendant's motion to amend this plea by an allegation that delay was given to this debtor, by Plaintiffs, also will be granted, but the proof of Plaintiffs having given such delay is very slight. That delay was given by Brazeau, there is no doubt, and the question comes up, does this affect Plain-

lièrement payées à leurs échéances respectives ci-haut mentionnées, de donner une quittance générale et finale au cédant du montant en entier de leurs créances respectives, pour tous comptes, billets, demandes et réclamations quelconques, qu'ils peuvent avoir, demander et prétendre contre le cédant, et de lui remettre et livrer alors tous billets et comptes dûment quittancés et acquittés, qu'ils ont actuellement en main ou qui pourraient avoir passé en mains tierces, par endossement ou autrement, à peine, etc., mais, dans le cas contraire, où les susdites sommes ne leur seraient pas régulièrement payées aux termes et de la manière ci-haut mentionnée, les cessionnaires auront alors le droit d'exiger du cédant le montant en entier de leurs créances respectives, avec intérêt, cette clause est de rigueur et non comminatoire, sans laquelle ces présentes n'eussent point été consenties."

tiffs ? Were the *co-cessionnaires* not bound to act together and are they not bound by each others acts ? I hold that they are, and that they are each *garant* for the acts of the other. If they divided the amounts collected an implied mandate was given by the one to the other, and delay given by Brazeau may be pleaded as against Plaintiffs ; therefore the action must be dismissed.

" Considering that Defendant hath established, by sufficient evidence, the allegations set forth in his exception to this action fourthly pleaded, namely : that, by an act of *transport* bearing date at Montreal, the 6th day of August, 1856, and executed before Mathieu and colleague, notaries public, Defendant did assign over to Plaintiffs, and to F.-Xavier Brazeau, in payment and in satisfaction of the amount due to Plaintiffs, certain sums of money amounting in the whole to the sum of £338 12 1 to be appropriated by the said *transport* to the liquidation and discharge of the sum of money due and owing to Plaintiffs and Brazeau, and in the proportions set forth in said act of *transport ;* and considering, further, that it was a condition of said act of *transport* that the debts then due by Defendant to Plaintiffs should be finally discharged by means of the sum of money then assigned over to Plaintiffs, and Brazeau, in the event only of the sums of money so assigned over in full discharge and liquidation thereof, being regularly paid at the times and dates of the said sums becoming due and payable ; and, further, considering that, in becoming thus proprietor of said debts so assigned over, Plaintiffs and Brazeau were bound in law, by force of the reciprocal obligations assumed by Plaintiffs and Brazeau, to do no act which could have the effect of altering and changing the legal obligations assumed by them at the time the *transport* was so made, or which could have the effect of disminishing or of defeating the right which Defendant had to claim the final discharge stipulated to be given by Plaintiffs and Brazeau to Defendant, under the express stipulations of the *acte de transport ;* and, further, considering that, by law, and by the legal effect of the *transport*, Plaintiffs and Brazeau were *garants* of each others acts in enforcing payment of the debts jointly assigned over to them ; and, further, considering that it is established that Brazeau did give and grant delay of payment to André Prud'homme, acting for M. Prud'homme, one of the debtors, whose debt was assigned over as stated in the act of *transport*, by reason of which, and by law, the condition stipulated in the act of *transport* became of no effect in law to bar or destroy the right of Defendant to plead the discharge of all the preexisting liabilities of Defendant towards Plaintiffs, and further, considering that the

sum of money now sought to be recovered has thereby become discharged and extinguished, in virtue of said act of *transport*, the court doth maintain the said exception pleaded by Defendant, and doth dismiss the action of Plaintiffs. (9 *D. T. B. C.*, p. 330, et 3 *J.*, p. 124.)

CHERRIER, DORION and DORION, for Plaintiffs.

DOUTRE and D'AOUST, for Defendant.

PREUVE.—ERREUR.

BANC DE LA REINE, EN APPEL, Montréal, 6 juin 1859.

Présents : SIR L. H. LAFONTAINE, Bart, Juge-en-Chef, AYLWIN, DUVAL et CARON, Juges.

WHITNEY, Appelant, *et* CLARK, Intimé.

Jugé: Que, dans l'espèce, entre commerçants, le commis qui a donné un reçu pour son préposé, est un témoin admissible pour prouver les circonstances et l'erreur sous lesquelles tel reçu a été donné, (1)

SIR L. H. LAFONTAINE, Bart., Juge-en-Chef : L'objet de cette action est de recouvrer du Défendeur la somme de £50, balance d'un billet fait par lui à l'ordre du Demandeur, le 7 mai 1856, pour le principal de £162 17 1, payable à six mois. L'action a été intentée en août 1857. Le Défendeur oppose à cette demande deux reçus, l'un du 3 septembre 1856, donné et signé par le Demandeur lui-même, pour £55, *en à compte du billet*, et l'autre du 17 novembre de la même année, donné et signé par Dufresne, teneur de livres du Demandeur. Ce dernier est en ces termes : " Received, from M. W. C. Clark, the " sum of £112 17 1, being *on account of note* due 10th ins- " tant." Les montants réunis des deux reçus forment une somme de £167 17 1, que le Défendeur prétend avoir payée ; ce qui fait £5, qu'il aurait payés de trop. Aussi, par l'une de ses conclusions, se réserve-t-il le droit de les répéter. Le Demandeur répond que c'est par erreur et sur les fausses représentations du Défendeur, que son commis Dufresne a été porté à lui donner, le 17 novembre, un reçu de £112 17 1, tandis que, ce jour-là, le Défendeur n'avait de fait payé que la somme de £57 17 1, ce qui, avec les £55, reçus le 3 septembre précédent, faisait la somme £112 17 1, laissant encore due la balance de £50. Voici comment les faits sont expliqués dans le témoignage de Dufresne. Le matin du 17 novembre 1856, le Défendeur va le trouver et lui paie £57 17 1. Il obtient un reçu de cette somme. Il part en disant qu'il reviendra dans l'après-midi et que probablement il paiera la balance. Il revient en effet dans cet après-midi, et dit qu'il a disposé de ses

(1) V. art. 1233 C. C.

fonds chez d'autres marchands, et qu'il ne peut pas payer la balance. Il représente à Dufresne qu'il avait auparavant payé £55, qu'il ne pensait pas en avoir de reçu, et il le prie de vouloir bien lui en donner un. Dufresne, le croyant sur parole, reprend le reçu de £57 17 1 qu'il lui avait donné le matin, et lui en fait un autre pour la somme de £112 17 1. Dufresne n'avait pas vu le reçu donné par le Demandeur le 3 septembre précédent. Si ce témoignage est admis, la preuve du demandeur est complète ; le reçu du 17 novembre ne doit valoir que pour £57 17 1. Il y a plusieurs circonstances qui viennent appuyer ce témoignage. Le reçu du 17 novembre n'est, comme celui du 3 septembre, donné qu'en *à compte* du billet. C'est là une déclaration que le Défendeur accepte en prenant le reçu du 17 novembre, qu'il cherche à faire valoir aujourd'hui. Il ne demande pas qu'on lui remette son billet, au contraire, ce billet continue à rester entre les mains du Demandeur, ce qui est une très forte présomption que le billet n'était pas entièrement acquitté. De plus, si le reçu du 17 novembre doit valoir pour la somme de £112 17 1, alors le Défendeur aurait payé £5 de plus que le montant du billet. Il est vrai que le Défendeur répond à cela que le Demandeur avait un petit compte courant contre lui, mais ce compte n'était pas encore arrivé à son échéance, et le reçu fait expressément mention que la somme payée ne l'est qu'en à compte du billet. Dans les livres du Demandeur, crédit n'est donné au Défendeur que de deux sommes, l'une de £55, payée le 3 septembre, et l'autre de £57 17 1, payée le 17 novembre. Dufresne n'est pas le seul témoin examiné. Un autre commis du Demandeur, Gravelle, a eu des conversations sur ce sujet avec le Défendeur qui lui a déclaré " that he kept no cash book," mais " that he had in " his mind that he had paid it long ago, but was not posi- " tive." Et après que Gravelle lui eût dit que les livres du Demandeur ne lui donnaient crédit que des deux sommes susdites de £55, et de 57 17 1, " the Defendant," ajoute Gravelle, " was satisfied that Plaintiffs' books were all right." Le Défendeur veut tirer avantage d'une lettre que le Demandeur lui a fait écrire par Gravelle, le 2 mai 1857, et dans laquelle le Demandeur ne reconnaît avoir reçu en tout que £112 17 1, savoir, £55, le 3 septembre, et £57 17 1, le 27 novembre 1856. " But," dit-il, " if you have a separate receipt for the " £55 paid in September, you are all right." Le reçu *séparé*, s'il existait, n'était pas un reçu qui dût s'appliquer aux £55 que le Demandeur reconnaissait lui-même avoir reçu le 3 septembre, parce qu'alors ce n'eût pas été un paiement *séparé*, distinct de celui-là, mais ce devait être un reçu qui eût établi le paiement d'une seconde somme de £55, *séparée*, distincte de la première, puisque le Défendeur préten-

dait avoir fait un tel paiement sans avoir pris un reçu. Je crois que c'est un cas dans lequel les circonstances justifient la preuve par des explications de l'effet dont se trouve nanti le Défendeur, et qu'il cherche à faire valoir au préjudice du Demandeur pour toute la somme qui, par suite de ses fausses représentations, s'y trouve être par erreur énoncée.

Le jugement de la Cour Supérieure, à Montréal, rendu le 30 avril 1858, est comme suit :

SMITH, J. "The court, considering that Plaintiff hath falled to establish, by legal and sufficient evidence, the material allegations of his declaration, and, further, considering that Defendant hath fully proved the material allegations of his exception namely, that, before the institution of the present action, he had fully paid the amount of the promissory note on which the action is brought. And, further, considering that Defendant cannot be barred from having and maintaining the conclusions taken in said exception, by reason of any thing alleged and set forth in the special answer contained. And, adjudging on the motion made by Defendant, that the evidence of Luc A. Dufresne, a witness produced by Plaintiff, for the purpose of supporting the allegations of the special answer, the court doth maintain the motion, and doth adjudge the evidence of the witness, Luc A. Dufresne, to be illegal and inadmissible, and doth reject the same; and the court doth maintain the exception of Defendant, and doth dismiss the action."

Le jugement de la Cour d'Appel est comme suit :

"The court seeing that the Respondent, on the seventh day of May, 1856, at the city of Montreal, made the promissory note mentioned in the declaration, for £162 17 0½ and then and there delivered the said promissory note to Appellant: seeing also that Respondent, on the third day of September, 1856, paid to Appellant on account of the promissory note, the sum of fifty-five pounds, and on the seventeenth day of November, 1856, the sum of £57 17 0½; and considering that the said two sums of money are the only sums of money paid by Respondent to Appellant on account of said promissory note; the receipt of the seventeenth day of November, 1856, having been given by error, as an acknowledgement of the said two payments, in consequence of Respondent having erroneously informed Luc A. Dufresne, a clerk in the employ of Appellant, and who gave the last mentioned receipt, that he, Respondent, had not been given a receipt for the payment of fifty-five pounds currency at the time it was made. And considering that, by reason of the premises, a balance of fifty pounds, with interest from the tenth day of November, 1856, remained due by Respondent to Appellant upon said promissory note, at the time of the institution of the present action,

and therefore, that, in the judgment pronounced by the court below, on the thirtieth day of April, 1858, dismissing the action of Appellant there is error, doth, in consequence, reverse, set aside and annul the judgment so pronounced by the court below; and this court proceeding to give such judgment as the court below ought to have given, doth condemn Respondent to pay to Appellant the sum of fifty pounds currency, being the Balance so due upon said promissory note, with interest from the tenth day of November, 1856. Honorable Mr. Justice Duval, *dissentiente*. (3 *J.*, p. 89 et 318, et 9 *D. T. B. C.*, p. 339.)

TORRANCE et MORRIS, pour l'Appelant.

H. STUART, pour l'Intimé.

ASSIGNATION.

SUPERIOR COURT, Montréal, 30 juin 1859.

Before BERTHELOT, Assistant-Judge.

FROTHINGHAM et al., Plaintiffs, *vs.* THE BROCKVILLE AND OTTAWA RAILROAD COMPANY, Defendants, and DICKINSON et al., Tiers-Saisis.

Jugé : Que, dans l'espèce, aucune signification légale du writ et de la déclaration n'avait été faite sur les Défendeurs.

A writ of *saisie-arrêt* was issued, on the 24th December, 1858, on affidavit, before judgment, and the sheriff of Montreal made a return of service on the 28th December, upon Dickinson, one of the *Tiers-Saisis*, at his office, in Montreal, and that "as the parties do not reside within the limits of my "district, I could do nothing further in the execution of the "within writ." The writ was served at Quebec, on the 31st December, on the other *Tiers-Saisi*, described in the writ as "Donald Cannon Thompson, of Quebec, in Lower Canada, "trader, as well in his individual capacity as in his capacity "of agent of the said Moss K. Dickinson. The action was founded on a judgment of the Court of Common Pleas, Upper Canada, in favor of Plaintiffs, against Defendants, and Defendants filed a declinatory exception, also an exception *à la forme*, on substantially the same grounds, namely: That Defendants had no domicile and no real or personal estate in Lower Canada, that their domicile was at Brockville, in Upper Canada, that the cause of action did not arise within Lower Canada. The Plaintiffs filed general answer to the exception, also a copy of a notarial agreement dated on the day previous to the issuing of the writ, made between Defendants, acting through Crawford their president, and Dickinson, one of the

Tiers-Saisis, under which agreement Dickinson relinquished his lien for freight upon about one thousand tons of railroad iron, stated in the agreement to be in his possession at Montreal, reserving such lien, with the company's consent, on about one thousand six hundred tons of iron, stated " as then in his (Dickinson's) possession, at Quebec, through his agent there, one Donald Cannon Thompson." Admissions were given to the effect " that the railway iron mentioned in the copy of " agreement filed with Plaintiffs' answers to Defendants' " exceptions, as being in the possession of Moss K. Dickinson, " at Montreal, was transferred and delivered by Defendants " to the Grand Trunk Railway Company of Canada, between " the date of said agreement, and the issuing of the writ in " this cause, and was not, at the date of the issuing of such " writ in the possession, or the property of Defendants, and " that the railway iron mentioned in said agreement as being " in the possession of Moss K. Dickinson, at Quebec, so " remained until after the issuing of said writ, and up to the " time of the filing of said exception."

JUDGMENT: " The court doth maintain the said exceptiou " *déclinatoire* and the said *exception à la forme*, and in con- " sequence doth dismiss Plaintiffs' action." (9 *D. T. B. C.*, p. 345.)

ABBOTT, for Plaintiffs."

TORRANCE and MORRIS, for Defendants.

SOCIETE.—INTERROGATOIRES SUR FAITS ET ARTICLES.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 3 septembre 1858.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL and CARON, Justices.

FOLEY, Appellant, *et* ELLIOT, Respondent.

Par acte de dissolution de société, F reçut, comme sa part des effets de la société, deux billets promissoires; l'acte contenant une clause qu'il serait loisible à F de remettre les deux billets, dans trois semaines, et de prendre telles marchandises appartenant au fonds social qu'il choisirait, à un montant égal aux deux billets, ajoutant 65 par cent sur le coût des marchandises Dans une action en dommages, par F contre E, fondée sur le refus de ce dernier de permettre à F de faire un choix, les deux billets ayant été dûment offerts:

Jugé: Que le choix de F n'était pas restreint ou limité à de certaines marchandises, et qu'il n'était pas tenu de prouver quelle espèce de marchandises il aurait choisi.

2° Qu'il était en droit de recouvrer, comme dommages causés par tel refus, une somme égale au montant des profits sur les effets, s'ils eussent été livrés aux termes de l'acte.

3° Que les interrogatoires sur faits et articles cités, avaient été légalement pris pour avérés.

This was an action instituted in the Superior Court Montreal, by Appellant against Respondent, who had previously been his partner in trade, claiming damages, for loss of profits caused by an alleged refusal of Respondent to deliver to Appellant certain goods, at a specified advance of 65 per cent. on the sterling cost. Under a stipulation contained in the notarial *acte* of dissolution of copartnership, the sum of £600 was agreed upon as the value of the interest of Appellant in the dissolved partnership, part of which was paid by two notes of Hickey and Company, at eight and twelve months, respectively, which notes were guaranteed by Respondent. The clause in the *acte* on which the action was founded was as follows: "that James Foley shall be at liberty, within "three weeks to return to John Elliot, the said notes of "Hickey and Company, and to take and select such goods, "from the stock of the partnership, to an amount equal to "such notes, and interest thereon, at sixty-five per cent. ad-"vance upon the sterling cost thereof." The plea of Defendant set forth that Appellant had not, within the time specified, offered to select goods from the stock of the late firm, and that Respondent was not bound to offer them until after selection, and that Respondent had not refused to allow the selection to be made. The judgment appealed from which was rendered on the 28th November, 1857. (SMITH, Justice) granted Plaintiff's motion that the *ninth and tenth interrogatories sur faits et articles*, submitted to Defendant be taken in the affirmative, *pro confessis*, and "considering that Plain-"tiff hath failed to prove the loss and damages alleged by "him, as it does not appear by the allegations of the declara-"tion or by any evidence of record, what description of goods "Plaintiff was, by said agreement, entitled to select, and that, "therefore, Plaintiff is not entitled, in law, to the conclusion "of the said declaration. Doth adjudge that his action be and "the same is hence dismissed;

In the Court of Appeals, the CHIEF-JUSTICE, said: The questions of fact raised are as to whether there was an offer by Appellant to return the notes and a demand made, within the three weeks, to take and select the goods from the stock of the late firm, and whether Defendant refused to permit such selection. These points the court considers established, and we are of opinion that Appellant had the right of selection from the whole stock of the partnership, and was not bound to specify or prove what particular goods he would have selected, and that he is entitled to the damages proved, being the loss of profit on the sale of the goods such as are proved to have made up the stock of the late copartnership.

Judgment: "Seeing that Respondent made evasive and

"unsatisfactory answers to the ninth and tenth interrogato-
"ries propounded to him upon *faits et articles* in the court
"below, and that, in consequence, said interrogatories were
"properly taken and held in said the court *pro confessis.* (1)

"Seeing that Appellant hath established in evidence that,
"within the three weeks mentioned in the deed between the
"parties, bearing date the thirteenth day of September, 1856,
"at Montreal, before Hunter, and colleague, notaries, he of-
"fered and tendered, according to the intent and meaning of
"said deed, to return to Respondent the two certain promis-
"sory notes of Hickey and Company, referred to in said
"deed, and claimed his right, under the same, to take and
"select goods as agreed upon from the stock of the partner-
"ship lately subsisting between said parties, and which was
"dissolved by said deed, and that Respondent, without any
"just cause, refused to permit such selection to be made, and
"to deliver such goods, whereby Appellant was deprived of
"certain profit and gain which he could have made by the
"resale of the goods, to the amount of thirty four pounds,
"twelve shillings; seeing also that, by said deed Appellant
"was not limited or restricted to any description of goods
"from among the stock of said copartnership, and that,
"therefore, in the judgment of the court below, by which the
"action of Appellant was dismissed, there is error: The court
"now here, doth reverse, &c., and it is considered and ad-
"judged that the exception by Respondent filed be dismissed,
"and that Respondent do pay to Appellant the sum of thirty
"four pounds, twelve shillings, as damages occasioned to Ap-
"pellant, by Respondent, by his unjust refusal to permit the
"selection of goods as aforesaid, and being the amount of
"profit which Appellant would have had in the resale of said
"goods, if delivered to him according to said deed." (9 *D. T. B. C.*, p. 349.)

MACKAY and AUSTIN, for Appellant.

TORRANCE and MORRIS, for Respondent.

(1) Interrogatory 9. Is it true that, at some time (and state when) on or before the 4th October last, Plaintiff offered you Hickey and Co's., said two notes, also a letter of guarantee signed by James Muir, as mentioned in Plaintiff's declaration and requested to be allowed to select goods, as provided in your articles of dissolution, and that you refused?

ANSWER—He came to me then, and, as far as I remember, asked me to let Morton select the goods for himself, this was no part of our agreement, as Morton was a customer of mine, and giving him goods was injuring my business, besides Foley agreed that Morton should not have the goods.

Interrogatory 10. Did Plaintiff, before the notarial protest was made by him against you, of which copy is filed, offer you James Muir's letter of guarantee in addition to Hickey and Co's., two notes?

ANSWER—It had nothing to do with the matter in hand.

GARDIEN.—PRIVILEGE.

SUPERIOR COURT, Montreal, 30 April, 1859.

Before MONDELET (C.), J.

POUTRÉ *vs.* LAVIOLETTE.

Jugé : Qu'un Défendeur dans une action en revendication, n'a aucun droit de retention pour le paiement de ses frais et honoraires, frais de garde, comme gardien judiciaire, dans une action en revendication contre le Demandeur, Défendeur en la cause : l'action ayant été renvoyée et le jugement signifié au gardien. (1)

The action was *en revendication* to recover the possession of a horse alleged to have been the property of Plaintiff and to have been seized in his possession, in a previous action *en revendication* instituted in October, 1855, by Lazure, and others, Plaintiffs, against the Plaintiff as Defendant. The declaration alleged that the horse in question was seized in that cause, and had been put into Laviolette's possession as *gardien*, that the action had been dismissed, and that Defendant had refused to deliver up the horse although duly notified and required so to do, conclusion *en revendication* and for £5 damages. The Defendant pleaded that he had been duly named *gardien judiciaire*, on the 20th October, 1855, in the case of *Lazure et al.* vs. *Poutré*, and had kept the horse until it had been taken out of his hands under the writ issued in the action against Poutré ; that he had a *droit de rétention* as to the horse, until the payment of the *frais de garde*, and was not bound under the writ in the cause to have given up the property without prepayment ; that Plaintiff had made no attempt in the former case to get possession of the horse during the pendency of that suit, and that no damage had been suffered. Conclusion that the action be dismissed, or, at least, that no judgment be rendered in favor of Plaintiff, unless he be ordered first to deposit in court £15, for such *frais de garde*, in default whereof that the horse be sold in the hands of the present *gardien* for payment of the said *frais de garde*.

MONDELET, Justice : The *gardien* has a privilege for his costs in certain cases, (2) but he has no *droit de rétention*, such as is pretended in this cause, and Plaintiff must have judgment.

JUGEMENT : " Considérant que le Défendeur est mal fondé " en sa prétention et qu'il n'existe aucune loi qui l'appuie, le " gardien n'ayant aucun privilège, lien ou droit de rétention

(1) V. art. 1994 C. C.

(2) Pothier, *Proc. civ.*, p. 124 ; 1 Pigeau, p. 683.

de la chose saisie revendiquée pour ses frais de garde." (9 *D. T. B. C.*, p. 360.)

LAFLAMME, R. and G., for Plaintiff.

CARTIER and BERTHELOT, for Defendant.

CORPORATION MUNICIPALE.—COTISEURS.—REMUNERATION.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 6 juin 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief Justice, AYLWIN, DUVAL and MEREDITH, Justices.

BOULANGER, Appellant, and THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MONTREAL, Respondents.

Le statut provincial de 1851 (14e et 15e Vict., ch. 128), consolidant les actes ayant rapport à l'incorporation de la cité de Montréal, décrète, sec. 34," qu'à toute assemblée trimestrielle ou spéciale du dit conseil, " après l'élection des membres d'icelui dans l'année 1852, et dans chaque " année subséquente, le dit conseil nommera autant de cotiseurs pour " la dite cité, n'excédant pas le nombre de neuf, qu'il pourra être néces- " saire, et le dit conseil pourra accorder aux dits cotiseurs pour leurs " services telle rémunération qu'il pourra juger convenable."

Le conseil vota une somme de £225 par année a chacun de certains cotiseurs comme rémunération; dans une action portée contre la corporation pour une plus forte somme que la somme ci-dessus mentionnée.

Jugé : 1° Que la décision du conseil, quant au montant de telle rémunération n'était pas finale, et que les cotiseurs, sous la section du statut ci-dessus citée, avoit droit d'action pour réclamer une rénumération raisonnable établie par témoignages, et basée sur la valeur des services rendus.

2° Que le plaidoyer dans la cause qui admettait qu'une somme de £107 18 1, avec intérêts et dépens, était due au Demandeur, demandant acte du dépôt de cette somme en cour, et concluant à ce que l'action du Demandeur fut renvoyée pour le surplus, donnait nécessairement droit au Demandeur d'obtenir jugement pour la somme offerte.

3° Que, dans les circonstances de la cause, la somme réclamée était justement due au Demandeur, déduction faite des paiements et sommes indiqués. (1)

Sir L. H. LAFONTAINE, Bt., Juge-en-Chef : L'Appelant a été employé par l'Intimé pour remplir les devoirs de cotiseur pendant les années 1853, 1854 et 1855. Par son action il réclamait pour ses services les sommes suivantes : pour l'année 1853 £150 0 0, pour l'année 1854 £250 0 0, puis, pour une liste de voteurs requise au termes du statut 14 Vic., ch. 153, faite durant cette même année £50 0 0, pour l'année 1855 £225 0 0, plus pour cette même année, pour avoir servi comme témoin généralement devant la Cour du Recorder £25 0 0, total £700 0 0. Il alléguait, dans sa déclaration, avoir reçu £300, de manière que ses conclusions n'étaient que pour la balance,

(1) *Vide* Gorrie *vs.* The Mayor, etc., of Montreal, 6 *R. J. R. Q.*, p. 225.

£400. Ce qui suit est le résumé que l'Intimée a donné elle-même, dans son *factum* imprimé, de sa défense à l'action : " que, le 6 mai 1853, le conseil de la cité de Montréal, en vertu des pouvoirs qui lui sont conférés par le chapitre 128 de la 14e et 15e Victoria, avait nommé l'Appelant comme un des cotiseurs pour la dite année ; que l'Appelant avait accepté cette charge, en avait rempli les devoirs, et avait reçu en paiement la somme de £100 qui avait été fixée par le conseil comme la rémunération qu'il devait recevoir pour ses services ; que l'Appelant avait accepté la dite somme, en avait donné un reçu et en avait été satisfait ; que l'Appelant avait également été nommé cotiseur pour les années 1854 et 1855, qu'il avait accepté et rempli la charge durant les dites deux années, et que le conseil avait fixé sa rémunération à £225 par an, ce qui formait une somme de £450, à compte de laquelle les Intimés avaient payé à l'Appelant £342 1s 11d, laissant une balance de £107 18s 1d, que les Intimés avaient toujours été prêts à payer, et qu'ils offraient en cour avec leur défense, ainsi que les intérêts et frais accrus sur l'action." L'Intimée disait de plus, dans sa défense, que les cotiseurs n'avaient pas fait les listes des voteurs, aux élections des membres du parlement, telles que prescrites par la 16e Vic., ch. 153 ; que ces listes avaient été faites par ses propres officiers ; que les devoirs des cotiseurs n'étaient autres que ceux auxquels ils étaient tenus par la 14e et 15e Vic., ch. 128, et les règlements et ordonnances du conseil ; qu'au surplus la 16e Vic., ch. 153, n'avait attaché aucun salaire, émolument ou rémunération à l'accomplissement des devoirs y imposés aux cotiseurs, et que le statut était en force en 1854 et 1855, lors de l'acceptation, par le Demandeur, de la charge de cotiseur ; que la demande de £25 pour avoir assisté à la Cour du Recorder, était inadmissible ; que, s'il y avait ainsi assisté, il ne l'avait fait qu'en accomplissement des devoirs de sa charge, et pour vérification ou correction des livres ou rôles de cotisation, sur appel, ou demande de revision par des personnes se prétendant lésées par la cotisation établie, et, qu'au surplus, le Demandeur n'avait droit à aucune rémunération sur ce chef de sa demande. Puis viennent les conclusions de la Défenderesse. " C'est pourquoi les Défendeurs demandent acte de la déclaration qu'ils font qu'ils ont toujours été prêts à payer la dite somme de £107 18s 1d, et du dépôt qu'ils font avec leur présente défense ; 1° de la somme de £107 18s 1d, balance due au Demandeur ; 2° de celle de £1 12s, pour intérêts accrus sur cette balance, depuis la date de l'assignation en cette cause, à ce jour ; 3° de la somme de £10 pour faire face aux frais accrus sur la présente action, jusqu'à ce jour (sauf à parfaire) et concluent à ce que les offres accompagnées de dépôt, soient déclarées suffisantes." Le 27 février 1858, le jugement suivant,

qui déboute le Demandeur de son action, fut rendu par M. le juge Smith : " The court considering that Plaintiff hath failed " to establish, by law, any right of action to recover the " sum claimed by him from Defendants, and, further, consi- " dering that Defendants have established, by legal and suffi- " cient evidence, the material allegations in said exception set " forth, and that no action doth lie in manner and from as " Plaintiff hath brought the same ; and, further, considering " that the offer made by Defendants hath not been accepted " by Plaintiff, doth dismiss the action of Plaintiff." Il est difficile de se rendre compte de ce jugement, surtout de la dernière partie, en présence des conclusions prises par la Défenderesse elle-même, qui ne demandait pas que toute la demande fût renvoyée, mais qu'elle le fût seulement en ce qu'elle pouvait excéder la somme par elle offerte et déposée au greffe. Les offres réelles auraient dû être, ainsi que la Défenderesse le demandait elle-même, déclarées bonnes et valables, avec condamnation pour autant au profit du Demandeur, sauf à faire supporter à celui-ci, s'il y avait lieu, la peine de son refus d'accepter les dites offres, en mettant à sa charge les frais depuis la défense et la consignation. Je suis d'opinion que le Demandeur avait droit au total de la rémunération par lui demandée pour ses services, comme cotiseur, pendant les trois années de 1853, 1854 et 1855. En 1852, neuf cotiseurs furent nommés. En 1853, le nombre fut réduit à cinq. Le Demandeur et Gorrie furent nommés cette année-là. En 1854 et 1855, le nombre ne fut que de trois, l'expérience ayant démontré que la cotisation était mieux faite et plus uniforme par un nombre de cotiseurs ainsi réduit. D'un autre côté, l'ouvrage était nécessairement augmenté pour les trois cotiseurs qui furent en charge en 1854 et 1855. A chacun des cinq cotiseurs de 1853, le conseil de ville vota une somme de £100 pour rémunération, ce qui faisait £500. Le Demandeur et Gorrie ne voulurent pas d'abord accepter cette somme de £100, ne la trouvant pas suffisante. Un de leurs collègues, M. Latourelle, étant tombé malade, ils avaient eu à faire la cotisation dans la partie de la ville qui lui avait été assignée. Ils eurent aussi à refaire en partie les rôles des deux autres cotiseurs, lesquels étaient défectueux. Le Demandeur et Gorrie se plaignirent de l'insuffisance de la rémunération offerte pour 1853, ainsi que de celle offerte plus tard pour 1854, par pétitions présentées au conseil en janvier ou février 1855. Ils furent de nouveau nommés cotiseurs pour l'année 1854 ; le Demandeur refusa d'accepter. Gorrie, ayant appris cela, intima aux membres du conseil qu'il n'accepterait pas non plus, lui, si le Demandeur persistait dans son refus. Là-dessus trois membres du conseil, Coursol, Thompson et Bronsdon, se rendent chez le Demandeur à la prière du maire et de plusieurs

de leurs collègues, le pressant instamment d'accepter, et enfin il cède à leurs sollicitations; mais il est entendu que la rémunération pour les devoirs ordinaires de cotiseur, ne sera pas moins de £250 pour cette année-là. L'acceptation du Demandeur assura celle de Gorrie. Maires et échevins, entendus comme témoins, attestent hautement la capacité de ces deux personnes, la confiance qu'ils avaient en elles, et l'avantage qu'il y avait pour la ville de s'assurer de nouveau leurs services. Les cotiseurs avaient déjà fait le rôle pour le Quartier-Est, en la manière ordinaire, lorsque l'Intimé découvrit, pour la première fois qu'une loi récente lui imposait l'obligation de faire faire en même temps une liste des personnes qualifiées à voter à l'élection des membres du parlement. Les témoins déclarent que cela mit les cotiseurs dans la nécessité de recommencer le rôle. Puisque par son propre fait, l'Intimée a exposé les cotiseurs à un travail additionnel, comment peut-elle justifier son refus de reconnaître leur droit à une rémunération pour ce travail. Dès le 2 février 1855, le comité de finances avait adopté un rapport dans lequel il recommandait d'accorder à chacun des cotiseurs la somme de £250, et de plus celle de £50, aussi à chacun d'eux, pour la liste des voteurs. Chose assez étrange, ce rapport ne fut pris en considération par le conseil de ville que le 10 décembre suivant, jour auquel après le rejet de deux amendements, la résolution suivante fut adoptée à une majorité de 11 contre 9. " That the amount of " compensation to be given the assessors for the current as " well as for the preceding year, be equalized by allowing " them for each year the sum of £225, each, in full compensa- " tion of their services." Le Demandeur a fait entendre un grand nombre de témoins, maires, échevins et officiers du conseil de ville. Il résulte de leurs témoignages la preuve la plus satisfaisante que la rémunération demandée par l'Appelant est loin d'être déraisonnable et exorbitante. Elle est même au-dessous du chiffre indiqué par plusieurs de ces témoins. Il est même constaté que le Demandeur et Gorrie ont été employés l'espace d'environ six mois à la cotisation de l'année 1853. Assurément la somme de £150 que l'Appelant réclame pour cette année-là, est une rémunération qu'on ne saurait regarder comme étant trop élevée. Je crois donc que le Demandeur avait droit de réclamer toutes les sommes qu'il a demandées, même pour l'année 1853, nonobstant la *traite* du 9 mai 1854, au moyen de laquelle il a touché une somme de £100, " being allowance," y est-il dit, " for services as one of the assessors for the year 1853." Le trésorier de la corporation déclare que le Demandeur a protesté et n'a entendu recevoir cette somme qu'à compte. Il en a été de même de M. Gorrie; et le témoignage de M. Sexton, le greffier du conseil, confirme, sous

ce rapport, celui du trésorier. L'Intimée a invoqué la 34e section du statut de la 14e et 15e Vic., ch. 128; elle a prétendu que, sous l'autorité de cette clause, le conseil avait le pouvoir de fixer arbitrairement la rémunération des cotiseurs, et que ceux-ci devaient se contenter, dans tous les cas, du chiffre ainsi fixé, qu'il fût de £2 ou de £200. Ce n'est pas là l'interprétation qu'il faut donner à la clause. D'abord cette clause reconnaît que les cotiseurs ont droit à une rémunération pour leurs services. A défaut de fixation par le statut, il faut dire que cette rémunération doit être conforme à la justice et à l'équité, et elle ne peut l'être qu'en autant qu'elle aura pour base la valeur des services. La clause dit : " telle rémunération que le conseil pourra juger convenable." La rémunération ne sera pas *convenable*, si elle ne répond pas réellement à la valeur des services. Puisque la loi donne aux cotiseurs le droit d'avoir une rémunération, il s'ensuit nécessairement qu'elle leur donne, par cela même, droit d'action. L'un ne peut exister sans l'autre. Du reste la corporation elle-même par les conclusions spéciales de sa défense, a reconnu l'existence de ce droit d'action. Comment peut-elle le nier en appel ? Le chiffre de la réclamation du Demandeur est de £700 0 0. Il faut en déduire le compte de l'Intimée contre le Demandeur (pièce n° 9 du Demandeur), lequel se monte à £342 1 11. De plus, le montant de la *traite* du 9 mai 1854, ci-dessus mentionnée £100 0 0, balance de £257 18 1 reconnue être exacte par l'Appelant dans son factum. Ainsi, je suis d'opinion qu'il aurait dû avoir jugement pour cette balance, avec intérêt à compter du jour de l'assignation.

MEREDITH, Justice : I am of opinion that the city council had a right, as they contend by their plea, to determine the amount of remuneration to be paid to the Appellant for the services on account of which he sues. The provision of the statute is in effect as follows. " The said council may appoint " as many assessors for the said city, not exceeding nine in " number, as may be necessary, and the said council may grant " to the said assessors such remuneration for their services, *as* " *they the said council may deem fitting.*" These words clearly convey a discretionary power to the city council, and such being the case, we have no right to substitute our discretion for that of the council. In the case of the *King* vs. *The Mayor and Aldermen of London.* (1) Lord Tenterden said : " If a matter is left to the discretion of any individual or body " of men who are to decide according to their own conscience " and judgment, it would be absurd to say that any other tri- " bunal is to inquire into the grounds and reasons on which

(1) 3 Bar. and Ald., 271.

" they have decided, and whether they have exercised their " discretion properly or not." Lord Tenterden added: " If such " a power be given to any one, it is sufficient, in common " sense, for him to say he has exercised that power according " to the best of his discretion." An american case, in principle very analogous to the present, will be found in 12 Johnson's Reports, p. 315. (1) In that case one Wilson, a constable, had conveyed certain paupers from one town to another, and under a particular statute he was entitled to receive so much money for his services, " as the supervisors of the county " should judge he reasonably deserved to have." The constable claimed $102, and the supervisors after examining the account allowed it to the extend of $28, and disallowed the residue as extravagant, unreasonable and unjust. The constable then sued out a writ of *mandamus* requiring the supervisors to audit and allow the account already mentioned. Judge Spencer in delivering the opinion of the court observed: " In the " present case, whatever may be thought of the reasonableness " of the allowance of the supervisors to the applicant, *he has* " *no legal right to any particular sum. He has no right to* " *any money, for the services performed, but such as the su-* " *pervisors shall, in their discretion, judge him entitled to;*" and in the case of the *People* vs. *The Superior Court of the State of New York*, (2) which was decided fifteen years after the case last cited, judge Sutherland, in rendering the judgment of the court, said: " We will not set up our judgment in " opposition to the judgment of a board of supervisors, as to " what is a reasonable compensation for services performed by " a constable for the public, no sum having been fixed by law. " It is to their judgment and discretion, and not to ours, that " the legislature have left the decision of that matter." And in the case of *Hull* vs. *The Supervisor of Oneida*, Judge Platt, in delivering the opinion of the Supreme Court of the State of New York, admitted the same doctrine, saying, in effect, that that court had no jurisdiction to control the discretion of the supervisors in judging what was a reasonable compensation for the services in dispute in that case. These cases came before the courts, it is true, under writs of *mandamus* but that is unimportant; because the decisions of the courts turned on the nature of the right sought to be enforced, and not upon the nature of the remedy used. The remark of Judge Spencer " That the Applicant has no right to any money " for his services but such as the supervisors shall in their " discretion judge him entitled to." And of judge Sutherland,

(1) *The People* vs. *The Supervisors of Albany*, 12 Johnson, p. 415.

(2) 5 Wendell's Rep., p. 125.

" It is their judgment and discretion, and not ours to which " the legislature have left the decision of that matter," are, it appears to me, as applicable to the present case, as to the cases in which they were made. According to the principle laid down in the cases cited, Plaintiff in this cause has no right to any remuneration for his services excepting such, to use the words of the statute, " as they the said council may deem fitting," and, if this be the case, it is immaterial whether the question now raised be brought before the court by writ of *mandamus* or writ of summons. It is doubtless true that the city council were bound in this matter, as in all others of the same nature, to exercise their discretion according to the rules of law, reason and justice ; and it is possible, nay I think probable, that they have put an unreasonably low estimate upon the services of the Plaintiff ; but that will not justify this court in substituting its discretion for that of the city council in a matter which the legislature has left expressly to the discretion of the latter body. The fact that Plaintiff was not compellable to act for the year 1854, does not appear to me to improve his position in a legal point of view. He, knowing that he was not bound to act, and knowing that the statute gave the city council the right to grant such remuneration as they might think fit to the assessors ; and knowing also that if he did not act, the council could have named others who would have been compellable to perform the duty of assessors, nevertheless thought fit to perform those duties himself ; and under these circumstances must, I think, be held to have done so, subject to the power expressly given by the statute to the council that they should " grant him " such remuneration for his services as they the said council " might deem fitting." It may be added that the office of assessors is a *charge publique*, and according to the principles, as well of the french (1) as of the english law, there would be nothing extraordinary if a member of a corporation were for a certain time compelled to discharge the duties of such an office, even without remuneration. Wilcock, n° 293, says : " In a corporation there are incidental and reciprocal " rights between the individual members and the body. On " the part of the members every freeman has an equal right to " be elected to offices and distinctions, and on the part of the " body it has the right to the service of every member in that " office to which the majority shall think fit to elect him." (2) Upon the whole I feel myself unable to concur in that part of

(1) Domat, *Droit public*, p. 116, liv. 1, tit. 16, sec. 4, n° 231.

(2) Wilcock on *Municipal Corporations*, n° 293, p. 127 ; see also n°s 296, 297, 300, 3, 4, 8.

the judgment now about to be rendered, by which a sum of money is allowed to Appellant, for his services as an assessor, beyond the allowance to which he is entitled under the by-law of the city council.

JUGEMENT : 1° " Considérant que l'acte provincial de 1851, " donne aux cotiseurs nommés par le conseil de ville, sous " l'autorité de cet *acte*, le droit d'avoir une rémunération pour " leurs services, et qu'il s'ensuit nécessairement que l'acte " leur a donné, par cela même, droit d'action ; que l'un de " ces droits ne peut exister sans l'autre ; que la négation du " droit d'action serait une violation des règles de la justice et " de l'équité ; que les Intimés eux-mêmes ont, par les conclu- " sions spéciales de leur défense à la demande reconnu l'exis- " tence de ce droit d'action dans la personne du Demandeur. " 2° Considérant que le Demandeur a été employé par les " Intimés comme cotiseur, dans la cité de Montréal, pendant " les années 1853, 1854 et 1855 ; qu'il est prouvé que le " Demandeur a bien et fidèlement rempli les devoirs de cette " charge durant chacune des dites trois années, et que, pour " la rémunération convenable de ses services, ainsi qu'il est " satisfactoirement établi par la preuve, il a droit d'avoir la " somme par lui demandée, savoir : la somme de £700, cours " actuel. 3° Considérant, d'un autre côté qu'il y a lieu de dé- " duire du montant de la demande (certaines sommes) formant " £442 1 11. 4° Considérant, que dans le jugement dont est " appel il y a mal jugé, puisqu'il n'admet pas le droit d'action " de l'Appelant, et qu'il le déboute de sa demande en entier ; " infirme, etc., et procédant, etc. Condamne les Défendeurs à " payer au Demandeur, pour les causes d'action énoncées dans " sa déclaration, la somme de £257 18s." L'hon. M. le juge MEREDITH, *dissentiente*. (9 *D. T. B. C.*, p. 363.)

CARTIER and BERTHELOT, for Appellant.

PAPIN, for Respondent.

ACTION PETITOIRE.

BANC DE LA REINE, EN APPEL, Montréal, 6 juin 1859.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et MEREDITH, Juges.

LORANGER, Appelant, *et* BOUDREAU *et ux.*, Intimés.

Jugé, dans la Cour Supérieure : Qu'un acquéreur qui n'a pas eu la possession, non plus que ses auteurs, d'un immeuble, ne peut le revendiquer sur un tiers qui en était en possession lors de telle acquisition.

Jugé, en appel : 1° Que l'adjudication sur décret opère tradition réelle, et que l'acquéreur est bien saisi et peut transmettre la possession.

2° Que tel acquéreur par indivis peut provoquer la licitation.
3° Que l'acquéreur même qui n'a pas été en possession peut revendiquer l'immeuble auquel il a un titre.

Sir L. H. LaFontaine, Bt, Juge-en-Chef : Joseph Brossard, par son testament solennel du 15 mai 1843, a institué pour ses légataires universels, à charge de substitution, ses petits enfants, c'est-à-dire, les enfants issus des deux mariages de Joseph Brossard, son fils, savoir : Joseph Charles Alfred Brossard, Eugénie Brossard et Léa Brossard, les deux premiers nés du premier mariage, et la dernière, Léa Brossard, née du second mariage. Le père de ces trois enfants étant mort le 19 mars 1848, a prédécédé leur aïeul, le testateur, celui-ci ayant passé de vie à trépas seulement le 8 juillet suivant. Ainsi les petits enfants recueillirent directement la succession de leur grand père, mais à charge de substitution.

Eugénie Brossard avait épousé Joseph Vidrecaire dit Saint-Hilaire. Elle était née le 15 avril 1830, et décéda sans enfants le 14 mars 1850. Elle n'avait donc pas encore 20 ans accomplis. Le testament qu'elle a fait, le 26 février 1850, en faveur de son mari, ne peut donc avoir aucun effet. Elle laissa pour héritiers légitimes son frère et sa sœur. Ceux-ci recueillirent sa part dans les immeubles de leur aïeul, mais aux charges imposées par son testament. Le 18 mars 1851, Alfred Brossard fut interdit pour cause de prodigalité. Benjamin Brossard, cultivateur de Longueuil, fut nommé son curateur. Le même Benjamin Brossard avait été, dès le 25 mai 1850, élu tuteur à la dite Léa Brossard. Le 2 mai 1850, Louis Tribotte dit Lafricain avait été élu tuteur à la substitution créée par le testament de Joseph Brossard, l'aïeul des enfants. Au nombre des immeubles faisant partie de cette succession, se trouvait un grand terrain de figure irrégulière, situé dans cette ville, entre les rues Craig et Saint-Louis. Un tiers de cet immeuble, divisé en deux sixièmes, fut, en vertu de deux brefs d'exécution dirigés, l'un contre Joseph Saint-Hilaire, et l'autre contre Benjamin Brossard, en sa qualité de curateur du dit Alfred Brossard, vendu par décret le 29 décembre 1853, à la poursuite de Pierre-Lucien Malo, et ce tiers de l'immeuble fut alors adjugé au Demandeur-Appelant. Le 28 janvier 1854, sur avis de parents convoqués à cette fin, Benjamin Brossard, ès-qualité de curateur à Alfred Brossard, l'interdit, et de tuteur à Léa Brossard, encore mineure, et Louis Tribotte dit Lafricain, ès-qualité de tuteur à la substitution, furent autorisés en justice à vendre les parts afférantes aux dits Alfred et Léa Brossard dans le susdit immeuble, pourvu que ce fût conjointement avec le Demandeur, aussi propriétaire d'un tiers dans cet immeuble, et à condition que cette vente se fît publiquement en la manière ordinaire. Le 19 février 1854, l'immeuble qui avait

été divisé en quatre lots, au désir d'un rapport d'experts préalablement obtenu, fut exposé en vente, à la porte de l'église paroissiale de Montréal, deux tiers d'icelui au nom de Benjamin Brossard, en ses qualités susdites de curateur et de tuteur, et au nom de Tribotte dit Lafricain, comme tuteur à la substitution, et l'autre tiers au nom du Demandeur. J. B. Beaudry se rendit adjudicataire du lot No 1, pour le prix de £375, et le Demandeur fut l'adjudicataire des trois autres lots. Mais, par acte de vente du 16 janvier 1857, Beaudry, déclarant qu'il ne pouvait obtenir la possession du lot No 1, le revendit à l'Appelant aux mêmes conditions qu'il l'avait acheté lui-même. Les Défendeurs, qui se prétendent de leur côté propriétaires du dit lot, refusant de le déguerpir, le Demandeur a dirigé contre eux la présente action, qui est l'*action pétitoire*. A cette action, les Intimés ont défendu en substance que, depuis le mois de mars 1850, eux et leur auteur, Joseph Saint-Hilaire, (le nommé Saint Hilaire sur lequel une partie de cette propriété fut vendue au décret à la poursuite de Pierre-Lucien Malo) ont toujours été en possession ouverte et publique comme propriétaires en vertu de deux donations consenties par Alfred Brossard, au dit Saint-Hilaire, le 18 mars, et le 16 avril 1850, c'est-à-dire, antérieurement à l'interdiction du donateur. Par la première de ces donations. Alfred Brossard cède à Saint-Hilaire tous les droits de sa sœur Eugénie Brossard dans les immeubles en question, droits dont il disait avoir hérité de sa sœur. Que l'on remarque que ce vagabond, prouvé avoir été depuis son enfance l'un des plus mauvais sujets qui aient existé, ivrogne et voleur, depuis condamné aux travaux forcés dans le pénitencier de cette province, choisit, le jour même de l'enterrement de sa sœur, pour faire cette donation au mari de celle-ci. Ce dernier également ivrogne, mais peut-être pas autant que l'autre, croit sans doute trouver, dans l'acceptation de la donation, quelque consolation de la perte de sa femme. Réflexion faite, Saint-Hilaire ne se croit pas bien assuré sur l'effet de cette donation. Il pense qu'elle pourrait bien n'avoir aucun effet, d'après la manière dont elle avait été rédigée. Il a sans doute craint que sa femme, étant morte sans enfants, n'avait laissé aucuns droits dont son frère pût *hériter d'elle* dans les immeubles en question. Le frère prenant sa part dans le tiers de sa sœur, non comme son héritier, mais bien en vertu du testament de son aïeul paternel. Aussi, un mois après, le 16 avril 1850, se met-il à l'œuvre et obtient-il de son trop complaisant beau-frère une nouvelle donation, qui lui est faite purement et simplement par Alfred Brossard de tous ses droits, quels qu'ils soient, dans les terrains en questions. Saint-Hilaire mourut *ab intestat* et sans enfants, le 29 avril 1856, laissant pour héritiers légitimes un frère et une

sœur, laquelle sœur est la Défenderesse en cette cause, femme de l'autre Défendeur. C'est à ce titre que les Défendeurs se prétendent en possession comme propriétaires. Il est aussi allégué, dans leur exception, que les procédés adoptés pour faire la vente des propriétés à la porte de l'église étaient nuls et illégaux, et que les formalités voulues en pareil cas n'avaient jamais été observées. Ce moyen de défense dépend de la solution du premier. Si les Défendeurs sont propriétaires, comme ils le prétendent, assurément les procédés adoptés en justice pour parvenir à la vente par licitation, sont illégaux et nuls par rapport à eux. Dans le cas contraire, je ne vois pas, et on ne nous a pas expliqué, en quoi ils puissent être attaquables. Dans l'interprétation d'un testament, la première chose à faire, c'est de rechercher quelle a été l'intention du testateur, et de donner effet à cette intention. Or il me semble que la clause portant défense d'aliéner contient plus qu'une simple défense d'aliéner ordinaire. Le testateur a voulu que les choses léguées à ses petits enfants fussent insaisissables, et leur servissent de pension alimentaire. Cette volonté du testateur ne serait pas suivie, si la cession faite par Alfred Brosard dût valoir. Il n'y a donc qu'en regardant cette cession comme nulle, à toutes fins quelconques, que l'on peut donner à cette volonté son plein et entier effet. A ce point de vue, je ne saurais reconnaître aux Défendeurs aucun droit de propriété dans l'immeuble en question. Reste à décider la question de la possession, celle sur laquelle repose le jugement qui a donné gain de cause aux Défendeurs et qui fait le sujet du présent appel. Le motivé du jugement est que le Demandeur ou ses auteurs immédiats n'ont jamais eu la possession. Il me semble qu'il y a là erreur. Remarquons d'abord que l'acquisition que Loranger avait faite d'un tiers de l'immeuble avant qu'on procédât à la licitation, n'est pas attaquée, non plus que sa possession de ce tiers. Propriétaire et possesseur indivis, on peut dire qu'il était propriétaire et possesseur du tout, conjointement avec Alfred et Léa Brossard. Ne pouvant être obligé de demeurer dans l'indivis, il avait donc le droit de provoquer la licitation." Le do-
" maine de propriété des choses se transmet par le droit civil
" d'une personne à une autre sans tradition ne prise de posses-
" sion en plusieurs cas, soit à titre universel, soit à titre
" sigulier." (1) " Les adjudications qui se font en justice sont
" aussi," dit le même auteur," une manière d'acquérir du droit
" civil. L'adjudication transfère de plein droit à l'adjudicataire
" le domaine de propriété de la chose qui lui est adjugée,
" qu'avait celui sur qui l'adjudication est faite, pourvu que

(1) Pothier, *Du droit de propriété*, n° 248.

" cet adjudicataire paie le prix de l'adjudication." (1) Puisque le domaine de propriété est ainsi transféré, il y a donc lieu, pour l'adjudicataire, de le revendiqner. L'action qui compétait à Beaudry à cette fin, doit appartenir à son acheteur, Loranger. Sinon, il n'y aurait jamais moyen de revendiquer un propritété dans un tel cas, ou dans des cas analogues. " Lorsque " le vendeur n'eft pas lui-même en possession de la chose qu'il " vend," dit Pothier, *De la vente*, n° 317," il est évident qu'il " ne peut faire aucune tradition réelle ni feinte de cette chose ; " car la tradition étant *datio possessionis*, le vendeur qui n'a " pas lui-même la possession de la chose qu'il vend, ne peut la " donner à l'acheteur ; *nemo dat quod non habet*. Il ne peut " en ce cas que subroger l'acheteur au droit qu'il a de reven- " diquer la chose : la demande que donne l'acheteur en con- " séquence de cette subrogation, ne le saisit que du droit de " revendiquer, et non de la chose revendiquée qui lui a été " vendue ; ce n'est que le délai qui lui est fait sur cette de- " mande, qui le saisit de cette chose, et qui lui en fait acquérir " la propriété, en lui en faisant passer la possession." Si, même dans ce cas, lorsqu'il n'y a tradition ni réelle ni feinte, l'action de revendication peut compéter à l'acquéreur, à plus forte raison cette action doit-elle compéter à Beaudry qui, comme adjudicataire sous autorité de justice, avait du moins transmis en sa personne, à titre singulier, en vertu du droit civil, le domaine de la propriété. (2)

JUGEMENT : La cour, 1° considérant qu'antérieurement à la licitation faite, sous autorité de justice, de l'immeuble revendiqué en cette cause, le Demandeur-Appelant en avait acquis un tiers indivis dont il était en possession comme propriétaire ; que son titre d'acquisition n'est pas attaqué, ni sous le rapport de la propriété, ni sous le rapport de la possession ; que n'étant pas obligé de rester dans l'indivis il avait le droit de provoquer la licitation ; 2° considérant qu'en devenant adjudicataire de l'immeuble dont il s'agit, lors de la licitation, Jean-Baptiste Beaudry a acquis le domaine de propriété du dit immeuble, et avait, par conséquent, droit d'action pour le revendiquer ; que cette action a passé de Beaudry au Demandeur-Appelant, en conséquence de la vente faite subséquemment du dit immeuble par le premier au dernier, 3° considérant qu'il n'est pas établi que les Défendeurs qui sont en possession du dit immeuble, et qui prétendent l'être à titre de propriétaires, aient aucun droit à cette propriété ou même à cette possession ; que, partant, dans le jugement dont est appel, il y a mal jugé ; infirme le jugement, rendu le trente-unième jour du mois de décembre

(1) Ibid., n° 251.

(2) V. art. 1472 C. C.

dernier, par la Cour Supérieure siégeant à Montréal, et cette cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, déclare le Demandeur-Appelant propriétaire du terrain ou emplacement désigné dans les conclusions de sa déclaration,... et, en conséquence, condamne les Défendeurs à quitter et abandonner, sous trente jours de la signification du présent jugement, la jouissance et possession du dit terrain ou emplacement; sinon, et à défaut par eux de ce faire, qu'ils soient, à l'expiration du dit délai, dépossédés par voie de justice, et le Demandeur mis en possession du dit terrain ou emplacement et dépendances; condamne de plus les Défendeurs à payer au Demandeur-Appelant les fruits et revenus qu'ils ont perçus du dit terrain ou emplacement, pendant leur injuste détention, lesquels fruits et revenus seront, sous l'autorité de la Cour Supérieure, estimés et évalués par experts à être nommés par les parties, sinon d'office, en la manière ordinaire et usitée en la dite cour. Voici en quels termes était conçu le jugement de la Cour Supérieure : " The court, considering that Plaintiff hath failed to establish, by legal evidence, that he, Plaintiff, or his immediate *auteurs*, ever had any possession whatever of the lot of land sought to be revendicated in and by the present action ; and, further, considering that, at the time of the sale of said lot of land, by authority of justice, under and by virtue of which Plaintiff claims title, said lot of land and premises were in the adverse possession of Joseph Vidrecaire dit Saint-Hilaire, the *auteur* of the present Defendants, as the proprietor thereof, and that, by reason of such adverse possession, and, by law, Plaintiff cannot have and maintain his action of revendication as by him now brought, the court doth dismiss the action of Plaintiff." (9 *D. T. B. C.*, p. 385.)

J. M. LORANGER, pour les Appelants.

LAFRENAYE et PAPIN, pour les Intimés.

PROCEDURE.—INSCRIPTION.

SUPERIOR COURT, Quebec, 14th June, 1859.

Before CHABOT, Justice.

SMITH et al. *vs.* O'FARRELL.

Jugé : Que l'avis d'inscription aux enquêtes et aux mérites, qui doit être donné à une partie forclose sous les dispositions de la 12e Vic., ch. 38, sec. 25, doit indiquer le jour où l'enquête et l'audition auront respectivement lieu.

O'FARRELL, for Defendant, moved to strike the inscription ex parte, on the *enquêtes* and *rôle de droit*, respectively, on the

ground that, in the notices served on Defendant, under the provisions of the 12th Vic., cap. 38, sec. 25, the particular days on which the *enquête* and hearing would respectively take place, were not specially mentioned; the notices were merely general, without mentioning any particular day.

VANNOVOUS, for Plaintiffs, contended, that it was necessary, under the clause of the statute referred to, to mention the particular day on which evidence would be adduced, or the cause would be heard, so long as one clear day was allowed to elapse between the notice and the *enquête* and hearing, in the cause.

CHABOT, Juge: Je suis d'opinion que la motion doit être accordée. La pratique, dans le district de Montréal et dans ce district aussi, est de mentionner le jour que la partie procédera à l'enquête et à l'audition, cette question paraît même avoir été décidée dans ce sens en Cour d'Appel (1); et il est juste qu'il en soit ainsi, autrement le Défendeur serait obligé d'attendre en cour de jour en jour jusqu'à ce qu'il plût au Demandeur de procéder. Motion granted. (9 *D. T. B. C.*, p. 392.)

VANNOVOUS, for Plaintiffs.

O'FARRELL, for Defendant.

SUBPŒNA.—TARIF.

COUR SUPÉRIEURE, Québec, 14 juin 1859.

Présent: CHABOT, Juge.

COUILLARD *vs.* LEMIEUX.

Jugé: Qu'une motion pour reviser la taxe du protonotaire qui refusait au Demandeur les frais de l'huissier pour signification de subpœnas, par la raison que l'on avait inséré plus de quatre noms dans le subpœna original doit être accordée; et l'introduction de plus de quatre noms dans le subpœna original ne peut nullement être préjudiciable. (2)

Le Demandeur, ayant obtenu jugement contre le Défendeur, fit motion pour reviser la taxe du mémoire de frais, dans lequel le protonotaire avait omis et refusé d'entrer en taxe contre le Défendeur la somme de £2 15 0, pour frais d'huissier pour signification de subpœnas.

TESSIER, pour le Demandeur, maintint qu'il n'y avait aucune règle de pratique qui prescrivait qu'il ne devait y avoir que que quatre noms dans chaque subpœna; qu'autrefois il y avait une règle de pratique à cet effet, mais que cette règle de pratique avait été abolie par les règles en force, et qu'il n'y avait

(1) *Renaud* and *Gugy*, 6 R. J. R. Q., p. 301.

(2) V. art. 10 du Tarif des protonotaires de la Cour Supérieure.

maintenant aucune loi ou règle de pratique en force qui donnait au protonotaire le droit d'imposer cette condition aux parties dans une cause, et qui les obligeait de ne mettre que quatre noms dans chaque subpœna original, à peine de nullité.

CARON, L. B., pour le Défendeur, dit que la pratique était de ne jamais mettre plus de quatre noms dans chaque subpœna, et que, conséquemment, le Demandeur ne pouvait avoir les frais d'huissier; et que, dans le cas où cette pratique était enfreinte, les frais de signification étaient refusés.

CHABOT, Juge: La motion doit être accordée. Le Demandeur a droit de faire taxer les frais de signification contre le Défendeur qui l'a contraint à encourir ces dépens; et il importe peu que le Demandeur ait mis plus de quatre noms dans chaque subpœna, il n'y a aucune règle qui restreigne les parties à ce sujet, la règle maintemant établie aura seulement l'effet de diminuer le nombre de subpœnas qui émaneront du greffe, et le montant de la recette du protonotaire. Motion accordée. (9 *D. T. B. C.*, p. 393.)

TESSIER, pour le Demandeur.

BOSSÉ et CARON, pour le Défendeur.

CONSTITUTION DE NOUVEAU PROCUREUR.

QUEEN'S BENCH, APPEAL SIDE, Québec, 14 septembre 1859.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

MCCARTHY, Appellant, *et* HART, Respondent.

Jugé: Que lorsque deux procureurs sont associés, et que l'un d'eux est nommé au banc, comme juge-assistant, signification sur l'autre associé est suffisante, quoiqu'aucune substitution n'ait eu lieu. (1)

The Appellant, by her attorneys, Stuart and Vannovous, who were copartners, as advocates, proctors, &c., obtained permission to appeal from a decision of the Court of Queen's Bench, to Her Majesty in her privy council. Subsequently to this, Mr. Stuart, one of the partners, was nominated to the bench, to supply the temporary vacancy occasioned by the acceptance by the honble. Mr. Justice Morin, of the office of commissioner for the codification of the laws. The Respondent afterwards moved, in accordance with the terms of the law, that, inasmuch as six months had expired from the granting of the appeal to the privy council, and Appellant had produced no certificate as required by law, that the record be transmitted to the Superior Court, and served this

(1) V. art. 200 C. P. C.

motion, together with a notice of its presentation, upon Mr. Vannovous the remaining partner of the firm of Stuart and Vannovous. VANNOVOUS, for Appellant, now objected that there had heen no service of the motion upon the attorneys of Appellant; that the attorneys of record for Appellant, were Stuart and Vannovous, and it appeared, by the return of the bailiff, that the motion had been served upon Vannovous only; an l that, consequently, there was no legal service, inasmuch as there had been no substitution of attorneys to Stuart and Vannovous, and that until there was a substitution, no service could legally be made other than upon Stuart and Vannovous, the attorneys of record. ANGERS, for Respondent, contended that the service upon Vannovous, the remaining partner of the firm of Stuart and Vannovous, was sufficient, and that it was not necessary for Respondent to compel the Appellant to make a substitution of attorneys, before he could make the motion, and that this point had been already decided by the courts, both here and in Montreal.

Sir L. H. LAFONTAINE, Brt., Chief-Justice: The majority of the court are disposed to grant the motion. The attorneys of Appellant were in partnership, and when one of the partners withdrew, the remaining one represented the partnership, and a service upon him was sufficient. This point was decided in Montreal many years ago, in the case of *Dubois* vs. *Dubois*, (1) in which I was concerned when practising at the bar, in copartnership with Mr. Berthelot in the case, no proceedings were taken for a long time after the institution of the action, nor until I was promoted to the bench, when a notice was served upon Mr. Berthelot alone, and the objection was then taken, and it was held that the notice upon him alone, although there had been no substitution of attorney, was sufficient. In France, attorneys *(procureurs)* could not enter into copartnership, but, here, it is different, and the practice of a number of years has recognised these professional partnership, but, in France, by the *ordonnance* of 1667, *procureurs* were public officers and could not enter into copartnership. This will he found laid down in the 5 Nouveau Denisart. If a party could cause all proceedings in a case to be stayed until he was compelled to make a substitution of attorneys, it would occasion in many instances great inconvenience and delay, for these reasons, the majority of the court are of opinion that the motion ought to be granted.

MONDELET, Justice: I regret that I have to differ from the majority of my brother judges on the present occasion. I cannot now recall to my recollection the circumstances of the

(1) 4 *R. J. R. Q.*, p. 322.

case of *Dubois* vs. *Dubois* to which His Honor the Chief Justice has referred, but my impression is that this question was not formally decided in that case. If my recollection serves me correctly, the circumstances in that case were different from those in the case now under consideration, and, of course, there must be a variety of decisions, in order to meet the various circumstances of different cases, the decision of course must depend upon the circumstances of the case. But in the district of Montreal, the practice has generally been, indeed, I may say, has always been, such as my brother judge, Duval, and myself, believe to be the correct course, that is, that a substitution of attorneys in a case such as the present, is necessary, and that the service of a paper upon the remaining partner of a dissolved partnership or firm, is insufficient and illegal ; and if this question has been differently decided in the case of *Dubois* vs. *Dubois*, it is an exceptional case, and contrary to the general rule. It has been said that in France partnerships were not allowed. I have, searched the authorities in vain, and I can find no prohibition. The profession is independent of the government, and of any other authority, and an advocate is accountable to no one nor can his actions be controlled by anybody, so long as he conducts himself in a manner reconcilable with his own conscience, and the dictate of justice. With respect to the inconvenience or delay which a substitution of attorneys may occasion, it is one of those arguments, *ex necessitate rei*, as there need be but very little delay. What is a delay of two or three days ? But I do not regard the question at all in this light. I am guided by the principles which govern the case. The members of the profession have a perfect right to enter into partnership. A client goes to an office where there are two or three advocates in partnership. He there employs the members of the firm, composed of two or three individuals, consequently, two or three intellects (*intelligences*) to transact his business or conduct his case. This *mandat*, therefore, is not to one individual, but to two or three ; if one should die, or two should die, the *mandat* terminates, as I do not say this without reflection, I refer to Pothier, *Traité du mandat*, n° 102, and n° 99, where this doctrine will be found laid down. The *mandat* in the present case was to two partners, one has left the firm, consequently, the *mandat* is at an end, and the other has no power to act without a substitution. For these reasons I have reluctlantly felt myself compelled to dissent from the majority of the court.

DUVAL, Justice : I dissent from the judgment, by reason of the consequences likely to result to the profession, and to the interests of suitors. Partnerships have been formed, while at

the bar, by all the judges on the bench, with the exception of chief-justice Bowen, who was elevated to the bench nearly fifty years ago, since which time it has been a common and general practice for members of the bar to enter into partnership. I know of no law against it. The ordinances of France in force in this country do not prohibit it; and this is clearly stated by Duvergier, *Traité de la société*; and even Troplong, who, it would be supposed might contradict it, but on the contrary, he also is of opinion that these partnerships were valid and legal. His argument of their illegality is founded on the law of 1816, and of course it will not be pretended that this law is in force in this country; and Troplong therefore is of opinion that prior to this law partnerships among advocates, were valid and legal in France; and besides it is too late at the present day, to pronounce them invalid, they have been recognized in this country for the last half century. Now the course to be pursued in cases like the present, is clearly laid down by Pothier, *Du Mandat*, n° 139. This will also be found well discussed by Delamarre et le Poitvin. (1)

The question to be decided here is one of great importance. When suitor goes into the office of an attorney and employs the services of a legal firm, he does so, because, in all probability, he places his confidence in the experiences of the senior member of the firm. He may have the greatest respect for the junior partner, who may be a young gentleman of ability and promise, a rising member of the profession, yet he places his confidence in the greater experience of the senior member, and would not, in all probability, have employed that firm at all, had it not been for the sake of obtaining the services of the senior member, if the senior member of the firm dies, there is a change in the partnership, and the *mandat* consequently ceases. (2) I have made inquiry and I find that the practice in Montreal is the same as it is in Quebec; and, in Montreal, there is always a substitution when there is a change in the partnership, and this is done as a matter of course, and in this respect the members of the profession in Montreal shew their good sense, because by this means they avoid all the delays which might otherwise be occasioned.

AYLWIN, Justice: This appears to be a small matter, although it has grown into huge dimensions. Whatever the attorney may be in France, or however his position may be held up in Canada, he is certainly an officer of the court. Partnerships bet-

(1) Tr. du Cont. de Commission, vol. 2, n° 448.

(2) Ordonnance of 1667, title 26. The moment the partnership is dissolved no matter from what cause, the procuration ceases, in the same manner as in the case of a mercantile firm.

ween attorneys were illegal in France, both in times past, and now, but this does not affect us in this country, because, for these last 30 years, they have been recognized by all the courts; and as partners enjoy advantages as such, they must not get greater advantages by putting the opposite party to the inconvenience and delay of compelling him to cause them to make a substitution whenever a change takes place in the partnership; and it cannot be said that it merely involves a delay of three days, for as in this case, it may occasion a delay of three months. This point has already been decided in Montreal, in a case of Boston against a member of the profession in that city. The reference to *Pothier's Mandat* has no application whatever to this case, for there, it is the *mandat ad negotia* but not *ad honorarium*, which is alluded to, and, therefore, the authority does not apply. In the present case, if the partnership has been dissolved, there has been no revocation. It has been said that the client's confidence may be reposed in one of the firm, well, perhaps the remaining partner is the one in whom the Appellant placed his confidence; but whether this is so or not, it is not a question for the court to consider, it is simply a matter for the discretion of the client. Can two partners address the court at the same time respecting the same case? Can two draw pleas and do the same work? With respect to these professional partnerships, the subject will be found ably discussed in Jousse, *Com. sur l'ord. de 1667*; and in the Ancien Denisart, *vbo* Procureur. Then again, in this case, this is not an ordinary elevation to the bench, cannot the partner so nominated to the bench, continue to act for his client? he is not a judge; he merely supplies a temporary vacancy; it would not be right to allow his temporary appointment to repeal the permanent relations between attorney and client; and attorneys, as officers of the court, must be held within the rules of the court. Upon the principle, therefore, held by the court in Montreal, in the case of Boston above referred to, the majority of this court now decide, and it is held that the judgment of the court below be affirmed.

MEREDITH, Justice: If I could regard a partnership between attorneys in the same light that I view an ordinary copartnership between private individuals, I would think that the appointment of a new attorney would be necessary upon the occasion of a dissolution of copartnership between attorneys however caused. But I think there is an essential difference between an ordinary copartnership and a copartnership between attorneys, who are empowered to perform public duties of great importance. An ordinary copartnership is, in contemplation of law, a legal entity, *personne morale*, as the french wri ters say, separate and distinct from the persons who com-

pose it, and capable of carrying on the business for which it was formed. But two or more attorneys cannot, by entering into copartnership, cause the existence of a *personne morale*, capable of acting as an attorney in a suit; their partnership may, for certain extra-judicial purposes, be a legal entity, *personne morale*; but that *personne morale* cannot, it is plain, as such, appear as an attorney or advocate in a court of law. When, therefore, a person appears by two or more attorneys, associated as copartners, he is represented by each of the attorneys forming the copartnership, and not by the *personne morale* formed by the copartnership; and, therefore, the fact of that *personne morale* ceasing to exist, either by a dissolution of copartnership or otherwise, cannot, of itself, annul the appearance filed by the attorneys who were so copartners, in so far as regards any of them, still capable of acting. These remarks are I think sufficient to show that the dissolution of the copartnership between Stuart and Vannovous cannot, of itself, and in so far as regards Vannovous, annul the appearance filed by Stuart and Vannovous for Appellant; because, according to my view, Vannovous is still attorney of record for Appellant, and in so far as Vannovous is concerned there has not been any *changement d'état*. But it may be contended that the power given to Stuart and Vannovous was a joint power, and, therefore, that Vannovous cannot act alone. Such a pretension however would in my opinion be unfounded. If the power of two attorneys were a joint power, then neither of them at any stage of the proceedings could act without the concurrence of the other; whereas we know that in the case of partnerships between attorneys, such attorneys not only are constantly in the habit of acting in the absence of each other, but are compellable so to act; for instance, an attorney would not be excused from filing a plea, or cross-examining a witness, by the absence of his copartner. I think it will hardly be denied that if an appearance were filed by two attorneys with a formal declaration that they could act only jointly, such an appearance would be rejected; and, if this be true, as I am satisfied it is, then the court cannot tacitly act upon a doctrine which would not be sanctioned if formally expressed in an appearance. I will merely add that the consequences to the bar might not only be unjust, but very serious, were it held that the power to two attorneys in copartnership is to be deemed a joint and not a several power. If that doctrine were well founded, then a partner continuing, after a dissolution of copartnership, to act in any case, could not do so without a new power of attorney, which we know in practice is rarely if ever obtained; and yet the want of which, assuming that the power to the partnership was a joint and not a several

power, might entail upon the party acting very grave responsibility. In support of the opinion adopted by the majority of this court, I may refer to the case *ex parte* Goslin, decided by the Court of Queen's Bench at Montreal, in January, 1846, the Judges present being Chief Justice Vallières, and Judges Rolland, Gale and Day. In that case (according to a note which I made at the time) the court held that where a member of a legal firm dies, the survivor represents the client formerly represented by the partners, and Mr. Justice Rolland observed that the same doctrine had been held some years previously in the case of *McCallum* vs. *Van Vleet*. It has also been decided by the Superior Court, at Montreal, "that when two attorneys, partners, appear for a party, one of them having left the district, the other may continue the procedure in his own name." (1)

LAFLAMME, LAFLAMME and BARNARD, for Appellant.

STUART and VANNAVOUS, for Respondent.

TARIF.—DEFENSE EN DROIT.

COUR SUPÉRIEURE, Québec, 14 juin 1859.

Présent: CHABOT, Juge.

NORMAND *vs.* HUOT dit ST LAURENT.

Jugé: Qu'une motion pour reviser la taxe du protonotaire, pour la raison que le procureur du Demandeur n'a pas droit à l'honoraire en entier d'une cause contestée au mérite, le seul plaidoyer filé étant une défense au fond en droit, doit être rejetée, tel plaidoyer étant un plaidoyer au mérite. (2)

DÉCHÈNE, pour le Défendeur, fit motion pour reviser la taxe du mémoire de frais par le protonotaire, par lequel mémoire, il avait alloué aux procureurs du Demandeur, pour honoraire, la somme de £12 10 0, en autant qu'il n'y avait pas eu de plaidoyer au mérite, ni d'inscription aux enquêtes, mais simplement, une défense au fond en droit; et, qu'en conséquence, les procureurs du Demandeur sous le tarif de 1852, n'avait droit qu'à l'honoraire de £6 5 0. ANGERS, pour le Demandeur, maintint que la défense au fond en droit, était un plaidoyer au mérite, et que le procureur du Demandeur avait droit à la taxe qui lui avait été allouée par le protonotaire.

CHABOT, Juge: La défense en droit est un plaidoyer au

(1) 5 R. J. R. Q., p. 65.

(2) V. art. 147 C. P. C.

mérite, et la taxe du protonotaire est conséquemment correcte. Motion rejetée. (9 *D. T. B. C.*, p. 405.)

LELIÈVRE et ANGERS, pour le Demandeur.

PLAMONDON et DÉCHÈNE, pour le Défendeur.

PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 16th September, 1859.

Before AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

FRY, Appellant, and THE RICHELIEU COMPANY, Respondents.

Où A, par contrat sous seing privé, vendit à B une cargaison de charbon, et par convention verbale garantit ce charbon être de la meilleure qualité, et en fit la livraison et fut payé pour icelui; et quatre jours plus tard, sous seing privé rédigé de même que le premier, vendit à B une autre cargaison de charbon, le garantissant être de la meilleure qualité, de même que la première cargaison, mais au lieu de livrer du charbon de la meilleure qualité, fit livraison d'une qualité inférieure;

Jugé: 1° Que le second sous seing privé rédigé de même que le premier, ne comportait pas une garantie que le charbon ne serait pas de la même qualité que celui livré en vertu du premier marché.

2° Que preuve verbale ne pouvait être admise pour établir la garantie non écrite, en autant que cette preuve tendrait à contrôler les conditions d'un contrat par écrit; et que B était tenu de payer le prix du charbon, stipulé par le contrat, de même que si ce charbon eût été de de la première qualité. (1)

The Appellant brought his action for the sum of $1296. 67, being the value of 259⅓ chaldrons of coal, alleged to have been delivered to Respondents, under the following *memorandum* of bargain and sale: " Henry Fry sells, and J. B. " Lamère, agent for the Richelieu Company, buys about 389 " tons steam coal, for the sum of five dollars per chaldron of " 30 cwt, cash on delivery, the ship to be free of moorage and " wharfage, to be discharged at Napoleon wharf. Quebec, " 7th August, 1858. JOHN LAMÈRE."

The declaration set forth that the Plaintiff sold, and the Defendants bought, the coal above mentioned; that, in pursuance of the above agreement of bargain and sale, Plaintiff brought the coals to the Napoleon wharf, on board of a vessel called the *Thusnelde*, and offered and tendered delivery of them to Defendants, in execution of the above agreement, but that Defendants refused to accept them; and that, thereupon, Plaintiff discharged them on the Napoleon wharf, and was, therefore, entitled to be paid the price of them, and Plaintiff prayed *acte* of his readiness to make such other and further

(1) V. art. 1234 C. C.

act of delivery as the Defendants should reasonably require. The Defendants pleaded that, at the time of the making of the *memorandum* of bargain and sale, it was verbally stipulated between the parties that the coal to be sold and delivered should be of the same quality as a cargo of coals which Plaintiff had previously sold the Defendants, in virtue of a *memorandum* of bargain and sale couched in the same terms as the one above recited, and was as follows: "Henry Fry "sells, and Mr. Lamère, agent for Richelieu Company, buys, "about 146 tons steam coal, at the rate of five dollars per chaldron of 30 cwt., cash on delivery. Quebec, 3rd August. HENRY FRY, per James Shaw." And that it was only upon the express guarantee by Plaintiff that the coals sold and delivered in virtue of the first recited *memorandum* should be of the same quality as those which he had sold to Defendants in virtue of the last recited *memorandum*, and which formed the cargo of the vessel called the *Maria*, that Defendants were induced to sign the first above recited *memorandum*.

The plea further recited that Plaintiff, instead of delivering coal of the same quality as the first cargo, which was of the best quality of Welsh steam coal, and which formed the cargo of the *Maria*, sought to deliver coal of a much inferior quality from on board the *Thusnelde*; that, thereupon, Defendants, by protest, requested Plaintiff to consent to a survey to establish the value of the coals, and informed him of the time and place where the same should be held, and that, in the event of the *experts* or surveyors pronouncing the coals to be of an inferior quality, and establishing the value thereof, that, in such case, if he, Plaintiff, should be willing to accept the diminished price which they should establish to be the value of the coals, they, Defendants, would receive and accept delivery of them, and pay such diminished price. That Plaintiff not attending, they caused the survey to be held by competent persons, who established the coals to be of an inferior quality, and of less value than the first cargo of coals sold to Defendants from on board the *Maria*. That, before the return of the action into the court, they tendered Plaintiff the sum of $1,190, being the value of the coals at the rate of $4½ per chaldron, and the amount of costs incurred before entry, at the same time offering such further sum for interest and costs as Plaintiff should be entitled to. The plea further reiterated tender, and was accompanied by a confession of judgment for the same amount.

The Plaintiff proceeded to proof, and, upon the cross-examination of his first witness, James Shaw, the agent of Plaintiff, and the person who made the agreement and signed the *memorandum* in question with Defendants, for the delivery of

the coal, the Plaintiff objected to the question put to the witness, "as to whether, at the time of the execution of the contract, he had not, in the name and on behalf of Plaintiff, verbally agreed and undertaken to deliver coals of the best quality, and of the same description as those which he, as the agent of Plaintiff, had, a few days previously to the signing of the *memorandum* in question, sold and delivered to Defendants, from on board of the *Maria*," the objection was made on the ground that no verbal testimony could be admitted in contradiction to the terms of a written contract, Defendants maintaining that such testimony involved no contradiction to the terms of the written *memorandum*, but was merely suppletory to it; and that they had a right to the introduction of such testimony, so as to enable the written *memorandum* to be interpreted by the light of all the surrounding circumstances. His Honor, Mr. Justice Chabot, maintained the objection and excluded the evidence. The Defendants then moved the court to revise this decision, when His Honor, the Chief Justice of the Superior Court ruled that Defendants were entitled to the admission of the testimony, and ordered it to be taken accordingly, *de bene esse*. It was then fully proved by Shaw, that he had agreed with Defendant that the coals should be of the best quality of Welsh steam coals, and the same as those which he had sold Defendants a few days previously from on board of the *Maria*. He also proved that Defendants refused to accept them in execution of the contract, and told Plaintiff that he could take them away, unless he thought proper to accept four dollars and a half per chaldron, which was more than the full value of them, and also that Defendants had offered him, the witness, and Plaintiff, personally, the sum of four dollars and a half per chaldron, for them, and all this, the day after the vessel, the *Thusnelde*, was moored to Defendants' wharf, and before she had discharged her cargo. He stated also that the Defendant subsequently gave Plaintiff permission to discharge the coals on the wharf, so as to avoid the detention of the vessel. The evidence adduced established the allegations in Defendants' plea respecting the verbal agreement above mentioned; the refusal of Defendants to accept the coal in execution of the contract; the holding of the survey, and the inferior quality of the coal, and that they were not worth more than four dollars per chaldron; and that the current market price, at the time they were sold, of the best quality of Welsh steam coal, was five dollars per chaldron; and that they were, consequently, one dollar less in value, per chaldron, than the best Welsh steam coals; and, therefore, one dollar per chaldron less in value than the cargo which Plaintiff had previously sold Defen-

dants from on board of the *Maria*. The evidence established also that Defendants had used a portion of the coals. Judgment was rendered, persuant to the terms of the plea of Defendants, condemning Plaintiff to pay costs from the filing of the confession of judgment.

IRVINE, for Appellant, contended that he was entitled to recover inasmuch as no warranty was expressed in the written contract, and that no parol testimony could be adduced or admitted to prove the verbal warranty, inasmuch as the parties had reduced their agreement to writing, and must be presumed to have inserted in the written instrument all they deemed necessary; (1) and that inasmuch as the Respondents had subsequently used a portion of the coals they had thereby rendered themselves liable for the full contract price. (2)

POPE, R., for Respondents, maintained that, inasmuch as a part *only* of the verbal agreement had been reduced to writing, verbal testimony was admissible to prove the whole agreement, and to shew all the circumstances surrounding the parties at the time of its execution. (3) That the Appellant having filed a bill of lading in the cause, in which the coals were described as of the best quality, was a sufficient proof of the warranty. (4) That admitting that the coals had been used, although this was not alluded to in the pleading, yet Respondents, in such case, were not liable for the full contract price, but only for the just marketable value of the coals. (5) That the *memorandum* sued upon having been drawn up by Plaintiff himself, in precisely the same terms as the *memorandum* made a few days previously with respect to the sale of the cargo of the *Maria*, amounted to an implied warranty, on his part, to supply the same quality of coals, apart altogether from the testimony respecting his verbal guarantee to deliver coals of the same quality as the others.

AYLWIN, Justice: The main question which arises here is, a to the admissibility of parol testimony to prove the warranty on the part of Appellant, as to the quality of the coals. The

(1) 1 Greenleaf on ev. p. 275; 29 English law and equity reports, p. 220; Story, on sales, p. 360.

(2) Ross' leading cases, p. 847.

(3) 1 Greenleaf, on ev., p. 376, s. 288 and 284; *Allen* vs. *Pink*, 4 *Meeson* and *Welsby*, p. 140; *Cave* vs. *Colman*, 3 *Manning* and *Ryland*, p. 2; *Powell* vs. *Horton*, 2 Bingham, N. C., p. 668; *Wood* vs. *Smith*, 5 *Moore* and *Ryland*, p. 124; 4 *Carrington* and *Payne*, p. 45; *Jeffrey* vs. *Walton*, 1 Starkie, *Nisi prius reports*, p. 267; *Ellis* vs. *Thomson*, 3 *Meeson* and *Welsby*, p. 445; *Evans* vs. *Pratt*, 3 *Manning* and *Grainger*, p. 759; *Sweet* vs. *Lee*, Ib., p. 452.

(4) *Bridge* vs. *Wain*, 1 Starkie, *Nisi prius reports*, p. 504.

(5) Pothier, *Contrat de vente*, n° 259; 17 Guyot, *Répertoire*, vbo *Vente*, p. 481.

statute of frauds which is in existence here, and is the same in its tenor and effect as the *Ordonnance du Moulin*, is perfectly clear and explicit upon this point; the 17th section of this statute provides that no contract over the sum of ten pounds shall be legal or binding, unless there be a *memorandum* in writing between the parties. In the present case, there was a *memorandum* in writing, and a perfect and complete *memorandum* under this clause of the statute; and this statute being in force here must be strictly carried out, and testimony of a verbal agreement in any way controling the *memorandum* in writing cannot therefore be legally admitted. The question of equity, the court cannot take into consideration. It is impossible for any human tribunal to administer absolute justice, and besides, even so far as equity is considered, it also may be with Appellant, because he was not present when the agreement was made, and his agent may never have told him what he had said with regard to the quality of the coals when he sold them. The authorities cited by Respondent do not apply. At the time of the agreement, Respondents ought to have caused a covenant as to the quality of the coals to be inserted in the written contract; not having done so, they alone must take the consequences, and the court therefore hold that the ruling of the judge at *enquête*, in rejecting the parol testimony to prove the verbal warranty, was correct and proper, and that the judgment of the court below, in admitting the verbal testimony, and granting the conclusions of the Respondent's plea, was illegal and erroneous and must therefore be reversed.

MONDELET, Justice, expressed his concurrence in the judgment, and observed that it was to be regretted that the practice of admitting testimony *de bene esse* prevailed to such an extent as it did in this district; that it put parties to a great deal of unnecessary expense, because it induced them to go on entailing costs, whereas if they had a final decision, they could if they thought proper, appeal from it, and thus be guided how to act in the cause, whether to withdraw or proceed further with it.

Judgment reversed. (9 *D. T. B. C.*, p. 406.)

HOLT and IRVINE, for Appelant.

POPE, for Respondents.

SAISIE-REVENDICATION.—PROCEDURE.

SUPERIOR COURT, Montréal, 30 septembre 1859.

Before BADGLEY, Justice.

ROUTH et al. *vs.* MCPHERSON.

Jugé: 1° Sur motion pour mettre de côté un writ de saisie-revendication et la saisie faite en vertu d'iceiui, que les allégués de l'affidavit mentionnée ci-bas, étaient suffisants pour faire rejeter la motion.

2° Que dans les cas de saisie-revendication où l'affidavit est insuffisant, le writ et la saisie peuvent être mis de côté sur motion, mais où les allégués de l'affidavit provoquent une issue, la manière de procéder est par exception à la forme.

BADGLEY, Justice: A motion is made to quash a writ of revendication issued on three grounds. The *first* and *third* grounds set up the insufficiency of the affidavit in general terms, the *second* ground is: "because it appears, by the affi-"davit, that Defendant was legally in possession of the stea-"mer seized under a lease from Plaintiffs." The affidavit sets up a notarial lease of the 21st May, 1859, by Plaintiffs, as trustees to the estate of Hooker, Jones & Co., to Defendant, of a steamer "for the season of navigation of the year, 1859, rec-"koning, say, seven months of the navigation of the said "year, to be computed from the first day of May now last "past." That Defendant was *en déconfiture*, and had "incur-"red liabilities for freight and charges and fuel to an extent "exceeding six hundred dollars," and had failed to pay the rent of the steamer, and that the vessel was liable to seizure at certain ports named.

The affidavit then states: "That notwithstanding the pre-"mises, Defendant, as deponent hath been credibly infor-"med and verily believes, is immediately about to despatch "the said vessel to Upper Canada, and should he do so, "the said vessel will, in all probability, touch at the said "port of cape Vincent, and the said other ports in Upper "Canada, in which case, owing to the fact of the insolven-"cy of Defendant, the said vessel will, in all probability, "be seized and be lost to Plaintiffs in their said capacities, "who are the owners and proprietors of said vessel. That, "by reason of the premises, deponent verily believes, that, "without the benefit of a writ of attachment, *saisie-"revendication*, for the purpose of seizing and attaching "said vessel and her appurtenances, and thereby prevent-"ing the departure of said vessel from the said port of Mont-"real, Plaintiffs will lose the same or sustain damage."

I am disposed to think this affidavit sufficient. An objection was made that the proceedings should not have been by

motion to quash, but by *exception à la forme.* I have consulted my brothers judges, and the distinction that we are disposed to lay down as to the mode of proceeding in action of *revendication* is this, that, if the affidavit is manifestly bad, the writ and seizure may be quashed on motion ; if the affidavit invite an issue upon the allegations contained in it, an *exception à la forme* is the proper course to be pursued. Motion rejected. (9 *D. T. B. C.*, p. 413, et 4 *J.*, p. 45.)

BETHUNE and DUNKIN, for Plaintiffs.

ABBOTT and DORMAN, for Defendant.

VENTE.—NOVATION.

BANC DE LA REINE, EN APPEL, Montréal, 7 juin 1859.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et MEREDITH Juges.

LAVOIE, Appelant, *et* CREVIER, Intimé.

Jugé : Qu'un débiteur ne peut se défendre d'une demande pour effets vendus et livrés, sous prétexte d'un billet promissoire à longue échéance qu'il a remis à son créancier, sans prouver que ce dernier l'a accepté.

L'action était portée par l'Appelant contre l'Intimé, en recouvrement : De la somme de £51 15 0, montant d'un billet et de la somme de £97 6 8, montant dont le Défendeur s'était reconnu redevable au Demandeur, le 24 juillet 1856, pour effets et marchandises vendus et livrés suivant compte produit. L'Intimé plaida d'abord que le billet du 2 septembre 1846, était payé et déchargé par le laps de cinq ans écoulé depuis sa confection et son échéance ; et, quant à l'autre montant, qu'il y avait eu règlement au moyen d'un billet promissoire fait en septembre 1856, souscrit par le Défendeur, et que le Demandeur avait accepté, en sorte que sur ce point l'action était prématurée. Sur ce dernier point le Demandeur répondait qu'il n'avait jamais accepté le billet de septembre 1856, et, quant à la prescription invoquée par le Défendeur qu'elle n'était pas applicable à l'espèce, le billet du 2 septembre 1846, n'étant pas fait payable à ordre, et n'étant invoqué que comme reconnaissance pour les effets et marchandises que lui avait livrés le Demandeur. Le Défendeur obtint gain de cause devant la Cour Supérieure qui rendit le jugement suivant :

Mr. Justice BADGLEY : The court, considering that the paper writing made and signed by Defendant, bearing date the 2nd September, 1846, is a promissory note made by Defendant in favor of Plaintiff, at the date thereof ; and, considering that said promissory note was due and payable in Lower-Canada,

at the time when the statute 12 Vict., cap. 22, came into force and effect, and no action for the recovery of the amount of said note was instituted against Defendant within the period of five years after said not became due and payable, the prescription invoked in this cause by Defendant is well founded and, thereby, said promissory note is, in law, held to be and to have been paid and discharged, at the time of the institution of this action; and, considering that, by the evidence of record it is sufficiently established that Plaintiff took and received from Defendant and retained his promissory note, bearing date the twenty-fifth day of July, 1856, for the sum of two thousand three hundred and thirty-six *livres*, former current money, payable at two years from date of said last note, for the goods and effects sold and delivered by Plaintiff to Defendant, upon an account then stated, and which said last mentioned note had not matured and become payable at the time of the institution of this action; doth dismiss the same.

AYLWIN, Juge: Cette cour concourt entièrement dans le jugement dont est appel en ce qui concerne le billet du 2 septembre 1846. Quant au compte, il est clair qu'il est dû, mais a-t-il été réglé par un billet ainsi que le prétend l'Intimé. Il est à observer qu'il y a une différence à faire entre un billet à ordre et un qui ne l'est pas. Le billet en question a été produit par l'Appelant. Ce n'est pas un billet à ordre. L'Intimé l'a remis, non pas au Demandeur, mais à son fils, qui, avant de l'accepter, le passa à son père. Celui-ci, après l'avoir examiné, dit à l'Intimé que ce papier ne suffisait pas, et lui demanda une obligation devant notaire. La cour ne peut voir là une acceptation du billet par l'Appelant, et un consentement au délai que ce billet contenait. Le jugement de la cour inférieure devra donc être modifié sous ce rapport, et l'Intimé aura à payer le montant du compte en question. Le jugement en appel est comme suit: " La cour, attendu que l'exception de prescription opposée par l'Intimé devant la Cour Supérieure au billet promissoire en date du 2 septembre 1846, pour la somme de douze cent quarante-deux livres, ancien cours, est bien fondée, et nécessitait le renvoi de sa demande, en autant qu'il s'agit de cette somme.

Attendu que l'amendement que l'Appelant a eu la permission de faire à sa déclaration, par l'ajouté d'un chef demandant la même somme de douze cent quarante-deux livres, pour marchandises vendues et livrées, suivant règlement et arrêté de comptes par écrit, ne change en rien les droits respectifs des parties, et que la prescription invoquée par l'Intimé est également applicable à l'écrit en question même envisagé comme tel arrêté, en autant qu'il porte le caractère et empreinte de billet promissoire et cédule.

Attendu que la Cour Supérieure en renvoyant la demande, en autant qu'il est question de la dite somme, a bien jugé.

Attendu que l'Appelant a fait preuve de la vente et livraison à l'Intimé, de marchandises et effets, au montant de la somme de quatre vingt dix-sept livres, six schellings et huit deniers courant; qu'il résulte de la preuve que l'Intimé lui-même a reconnu devoir la dite somme et qu'il en a fait une reconnaissance par écrit ou billet promissoire en faveur de l'Appelant, en date du vingt-cinq juillet 1856, savoir : pour deux mille trois cent trente-six livres, ancien cours, égale à icelle.

Attendu que l'Appelant n'a jamais accepté le dit billet, ni consenti au délai de deux ans, pour en payer le montant, que l'Intimé a invoqué, et que partant la dite somme était exigible, dès la date d'icelui, et que la Cour Supérieure, en renvoyant la demande de l'Appelant pour le dit montant, comme prématurée, a mal jugé ; infirme, annule et met au néant le jugement dont est appel, rendu en la Cour Supérieure, à Montréal, le vingt-huit juin 1856, en autant qu'il a rapport à la dite somme de deux mille trois cent trente-six livres, montant du dit billet; et procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, il est considéré et adjugé que le dit Intimé paie à l'Appelant, ainsi que par les présentes il y est condamné, la somme de quatre vingt dix-sept livres, six schellings et huit deniers, cours actuel, montant dû pour marchandises à lui vendues et livrées, avec intérêt sur icelle à compter du six mars 1857. L'honorable M. le juge Meredith *dissentiente.* (1) (9 *D. T. B. C.*, p. 418.)

LAFLAMME, LAFLAMME et BARNARD, pour l'Appelant.

LAFRENAYE et PAPIN, pour l'Intimé.

(1) M. Justice Meredith agreed with the court as to the rules of law governing this case, but differed as to the question of fact respecting which the judgment of the court below was reversed. He thought that the note for £97 2 8, payable two years after date, mentioned in the Defendant's plea, and produced by the Plaintiff with his special answer, had been accepted by Plaintiff on account of the goods sold by him to Defendant, consequently to the 2nd September, 1846, and he was therefore of opinion that Plaintiff had no right to sue for the £97, 6 8, until the note received by him for that sum had reached maturity.

ACTION EN DECLARATION D'HYPOTHEQUE.—DELAISSEMENT.

COURT OF QUEEN'S BENCH, APP. SIDE,
Montreal, 6 Sept., 1859.

Before AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

BELLANGER, Appellant, *and* DUROCHER, Respondent.

Dans une action hypothécaire jugement fut rendu condamnant le Défendeur, comme propriétaire et détenteur de l'immeuble hypothéqué, à payer la réclamation du Demandeur, si mieux il n'aimait, dans les quinze jours de la signification du jugement, délaisser et abandonner la dite propriété pour être vendue en justice, à défaut de quoi, le dit délai expiré, condamné purement et simplement au paiement de la dette.

Le jugement fut signifié le 15 mars, et un délaissement fait le 18 mai 1858, *de plano*, sans permission de la cour. Motion pour rejeter le délaissement fut renvoyée, subséquemment il fut émané une exécution contre les meubles du Défendeur comme débiteur personnel de Demandeur:

Jugé: Qu'une opposition à telle saisie sur ce que le délaissement avait été dûment fait, doit être maintenue, et mainlevée de la dite saisie accordée à l'Opposant. (1)

This was an hypothecary action in which judgment was rendered, in the Superior Court, Montreal, on the 28th December, 1857, declaring certain immoveable property hypothecated, and condemning Defendant, as proprietor, possessor and *détenteur* of the land, to pay to Plaintiff the sum of £65 12 6, with interest and costs; unless Defendant should prefer to abandon and give up the lot to be sold on the curator to be named *en justice*, which option Defendant was condemned to make within fifteen days from the signification of the judgment, in default whereof, and after said delay, Defendant was condemned purely and simply to pay the said sum, with interest and costs. This judgment was served upon Defendant, on the 15th March, 1858, and, on the 18th May following, Defendant made a *délaissement* of the property, with reserve of his recourse for ameliorations made by him upon the land. This *délaissement* was notified to Plaintiff's attorneys, who moved to reject it, as not having been made within the fifteen days next after the signification of the judgment. By judgment of the 28th June, this motion was rejected by DAY, Justice. (2) On the 1st September, 1858, Plaintiff issued an execution against the moveable effects of Defendant, who filed an opposition to the seizure, on the ground that the *délaissement* and *mainlevée* granted to Opposant was duly made, and that he was, therefore, not personally liable for the payment of the debt. This opposition was maintained by judgment of the

(1) V. art. 534 C. P. C.

(2) 7 *R. J. R. Q.*, p. 40.

30th December, 1858, BADGLEY, Justice. From this judgment Plaintiffs appealed, on the following grounds: 1° that. by the terms of the judgment, Defendant was condemned to the payment of the debt, inasmuch as he had not made the *délaissement* within the delay of fifteen days mentioned, and the judgment had the effect of *res judicata*; 2° that the *délaissement* could not be made *de plano*, without leave of the court, which leave the court below could not legally grant; 3° that, if there was an error in the judgment, in condemning Defendant personally, it was in accordance with the jurisprudence of the court, and could not be remedied by appeal on the part of Defendant.

AYLWIN, Justice, rendered the judgment, stating that the court was unanimously of opinion that the judgment of the court maintaining the opposition was well founded. (9 *D. T. B. C.*, p. 430.)

PICHÉ and BONDY, for Appellant.

OUIMET and MORIN, for Respondent.

Authorities cited by Appellant:

6 Nouv. Denisart, vbo *Délai*, p. 133, par. 6; 3 Anc. Denisart, vbo *Option*; 3 Bioche, *Dict. de proc.*, vbo *Délai*, No 7; Dalloz, *Jur. du royaume*, 1826, 2nd part, p. 130; 2 Grenier, *Hypoth.*, No 339.

OUVRAGE PAR MARCHE.

BANC DE LA REINE, EN APPEL, Montréal, 7 juin 1859.

Présents: Sir L. H. LAFONTAINE, Bart, Juge-en-Chef, AYLWIN, DUVAL et MEREDITH, Juges.

LA CORPORATION DU COMTÉ DE TERREBONNE, Appelante, *et* VALIN, Intimé.

Jugé: Que l'assignation donnée à une corporation municipale en laissant copie de l'exploit au secrétaire-trésorier est valable. (1)

Que sur bail d'ouvrage, à défaut par le locateur de faire les avances convenues, le conducteur peut se pourvoir en dommages.

L'Intimé, par acte notarié du 7 février 1857, entre lui et le secrétaire-trésorier de la corporation appelante, dûment autorisé à cet effet, s'engagea à construire un édifice pour tenir les séances du conseil municipal, et y loger le bureau d'enregistrement, moyennant la somme de £3600, dont moitié, £1800, payable le 1er mai, 1857, £900 au 1er janvier 1858, et la balance après la livraison de la bâtisse. L'Intimé se mit en frais de construction, fit transporter de la pierre sur les lieux, et les £1800 qui lui étaient payables au 1er mai 1857, ne lui

(1) V. art. 61, 62 et 63 C. P. C.

ayant pas été comptés, il protesta contre la corporation, et, plus tard, il poursuivit la même corporation, alléguant ses obligations, et le défaut de paiement à son échéance, le 1er mai 1857, de la somme stipulée, concluant à une condamnation contre les Appelants au montant de £300, pour les dommages par lui soufferts par suite du défaut de paiement. L'action fut signifiée en laissant copie de l'exploit parlant au secrétaire-trésorier des Appelants, à son domicile, lieu où se tenaient les séances et réunions de la corporation.

L'action procéda par défaut, et, sur la preuve qui fut donnée, la cour condamna la corporation à payer au Demandeur, l'Intimé, £100 pour valeur de la pierre et matériaux qu'il avait transportés sur les lieux, et £200 pour dommages résultant de l'inexécution par les Appelants de leurs obligations à son égard. Appel de ce jugement fut interjeté, les Appelants alléguant que la signification de l'action n'avait pas été faite au bureau d'affaires de la corporation, ni aux personnes compétentes à recevoir telle signification par les lois du pays ; qu'il n'était pas prouvé que la corporation avait révoqué le marché en question, et que le défaut de paiement de la somme de £1800 au 1er mai 1857, donnait bien le droit de la poursuivre en recouvrement de cette somme, mais non pas en recouvrement de dommages, *de plano*.

SIR L. H. LAFONTAINE, Bart, Juge-en-Chef : L'acte des municipalités ne dit pas à qui devra être laissé copie de l'assignation donnée à une municipalité, et en l'absence de dispositions à cet égard, la cour, considérant que le secrétaire est un officier permanent, et que, par l'acte de la 12 Vic., c. 38, les brefs ou *writs* de prérogative doivent être laissés au secrétaire des corps ou municipalités, ne peut faire autrement que de reconnaître la validité d'une assignation donnée à une municipalité, en parlant à son secrétaire. Et, quant au mérite de la cause, la cour ne voit aucune raison pour infirmer la condamnation portée contre les Appelants. Le jugement est en conséquence confirmé. (9 *D. T. B. C.*, p. 436.)

LAFRENAYE et PAPIN, pour l'Appelante.

LORANGER et LORANGER, pour l'Intimé.

CUMUL D'ACTIONS.

BANC DE LA REINE, EN APPEL, Montréal, 9 juillet 1857.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et CARON, Juges.

ONEIL, Appelant, *et* ATWATER, Intimé.

Jugé : Qu'on ne peut joindre dans une action en recouvrement de dommages des causes d'action provenant des faits d'un individu en sa qualité privée, et d'autres actes commis par lui dans l'exercice de sa charge de juge de paix. (1)

Cette cause prit naissance dans les troubles d'une élection municipale pour la cité de Montréal, le 22 février 1854. Oneil se prétendait un des électeurs, et, à ce titre, s'était rendu à l'hôtel de ville, où avait lieu la votation. Dans sa demande il se plaint que l'Intimé, qui avait été choisi pour tenir la paix à la dite élection, en sa qualité d'échevin et juge de paix, dans la vue de molester l'Appelant, attirer sur lui le mépris public et l'empêcher d'exercer sa franchise électorale, l'aurait assailli, et, par force et violence, l'aurait saisi au collet, insulté et injurié, menaçant de le faire arrêter comme *vagabond*, et l'aurait, de fait, fait appréhender et incarcérer sans aucun mandat d'arrêt, ordre d'emprisonnement ou sentence ; que, le même jour, vers l'heure du midi, l'Intimé le fit de nouveau appréhender au corps, sans cause ou raison quelconque, et le fit conduire à la station de police, et fit entrer dans divers registres et livres des rapports représentant l'Appelant comme ayant commis un assaut sur l'Intimé, ce même jour ; fit refuser le cautionnement de plusieurs personnes solvables offert par l'Appelant, et le fit ensuite conduire et enfermer en la prison commune du district ; que, dans l'après-midi du même jour, pendant qu'il était ainsi détenu à la station de police, l'Intimé fit et signa un mandat d'incarcération enjoignant à tous constables de conduire et livrer l'Appelant au geôlier de la prison commune de ce district, et à ce dernier de le recevoir sous accusation d'avoir troublé la dite élection ce jour-là, par des violences, menaces et autres actes malicieux, et déclarant, qu'en conséquence, dans l'hôtel de ville, il l'avait, sur vue, déclaré atteint et convaincu de telle offense, et le condamnait à être incarcéré dans la prison jusqu'à la fin de la dite élection ; que l'Intimé aurait de fait, sur ce document, fait conduire le dit Appelant, à la vue de tout le monde, et comme un criminel, jusqu'à la prison, et l'y aurait fait enfermer jusqu'au lendemain, et ce, sans que le dit Appelant eût donné aucune occasion de le traiter ainsi ; que, non content de ce que ci-dessus,

(1) V. art 15 C. P. C.

le dit Intimé, le 6 mars suivant, étant échevin et juge de paix, tel que susdit, aurait malicieusement, et dans la vue de nuire à l'Appelant, rédigé et affirmé sous serment une déposition dans laquelle il jurait faussement que l'Appelant avait assailli et frappé à la figure l'Intimé, dans l'exercice de ses fonctions de juge de paix, et, sur cette déposition, aurait fait appréhender l'Appelant, qui aurait été forcé de fournir un cautionnement au montant de £200, pour sa comparution devant la Cour Criminelle du district, afin de répondre à la dite accusation, dont l'Intimé aurait fait préparer un acte (indictment) qui fut soumis au grand jury, devant lequel l'Intimé se fit assigner et entendre comme témoin à l'encontre du dit Appelant, et le grand jury ayant rapporté qu'il y avait lieu de procéder sur la dite accusation, l'Appelant fut contraint de subir son procès qui fut suivi d'un acquittement ; qu'en conséquence de tous ces actes illégaux et malicieux de l'Intimé, l'Appelant avait été forcé à des déboursés considérables, au montant d'au moins £100, avait été privé de sa liberté, interrompu dans ses occupations, et assujetti à des peines et anxiétés longues et fatigantes et à des dommages dans son caractère et son crédit, et il concluait à une condamnation de la somme de £1000 contre l'Intimé. Ce dernier opposa que la demande contenait cumulation de plusieurs chefs de demande incompatibles, et qui auraient dû faire la matière de trois poursuites différentes, savoir : 1° un assaut et batterie sur l'Appelant ; 2° des injures verbales, et 3° une poursuite malicieuse par l'Intimé, et incarcération sans cause de l'Appelant.

La Cour Supérieure de Montréal rendit, le 28 juin 1855, jugement sur cette contestation préliminaire, comme suit : " The court, considering that Plaintiff hath joined, *cumulé*, grounds and causes of action, which are not of the same nature, and do not admit of the same defence, or of the same judgment, and which by law cannot be joined, *cumulé*, in one and the same action, doth maintain the said exceptions of Defendant, and each of them. And it is, thereupon, ordered and adjudged that Plaintiff shall, within one month from the rendering of this judgment, make his option between the several causes of action, and between those which complain of Defendant individually and as a private citizen, and those which complain of acts by him done in his capacity of Justice of the Peace ; and that, in default of making such option, within the time prescribed, the court doth dismiss the action."

Ce jugement soumis à la revision de la Cour d'Appel, a été confirmé. (9 *D. T. B. C.*, p. 442.)

BETHUNE et DUNKIN, pour l'Appelant.

W. DORMAN, pour l'Intimé.

VENDITIONI EXPONAS.

SUPERIOR COURT, Québec, 4 novembre 1859.

Before CHABOT, Justice.

THE QUEBEC BUILDING SOCIETY, Plaintiffs, *vs.* ATKINS et al., Defendants, and ATKINS et al., Opposants.

Jugé : Qu'une opposition à un writ de *venditioni exponas*, sera rejetée sur motion, si telle opposition est filée sans la permission d'un juge. (1)

ALLEYN, R., for Plaintiffs, moved to reject the opposition *à fin d'annuler*, filed to the writ of *venditioni exponas*, on ground that no opposition could be filed to a writ of *venditioni exponas*, unless with the permission of the court or of a judge; and that, as no such permission had been obtained, it must be rejected.

CHABOT, Justice : L'opposition doit être rejetée, car aucune opposition ne peut être filée à un writ de *venditioni exponas*, sans la permission d'un juge préalablement obtenue; quoique l'ordonnance dise qu'une opposition ne peut être filée en aucun cas contre un writ de *venditioni exponas*, néanmoins la pratique ici a toujours été de le permettre en obtenant la permission d'un juge; dans le cas actuel, cette permission n'ayant pas été obtenue, la motion pour rejeter l'opposition est accordée. (9 *D. T. B. C.*, p. 447.)

ALLEYN, R., for Plaintiffs.

ANDERSON and PARKIN, for Opposants.

ASSURANCE CONTRE LE FEU.

BANC DE LA REINE, EN APPEL, Montréal, 12 janvier 1857.

Présents : Sir L. H. LAFONTAINE, Bart, Juge-en-Chef, AYLWIN, DUVAL et CARON, Juges.

THE BRITISH AMERICAN INSURANCE COMPANY, Appellants, *et* JOSEPH, Intimé.

Jugé : Qu'une assurance contre le feu effectuée sur une certaine quantité de charbon, couvre le charbon qui existait alors et celui apporté depuis, et s'étend aux risques provenant de la combustion spontanée du charbon. (2)

Joseph, dans sa déclaration, dit que, le 7 juillet 1854, il obtint des Appelants une police d'assurance contre les risques du feu, au montant de £1000, sur une quantité de 1600 à 1800 chau-

(1) V. art. 588 et 664 C. P. C.

(2) V. art. 2573 C. C.

drons de charbon ; que, le 6 novembre 1854, le feu prit et se déclara dans un monceau du charbon assuré et que 853 chaudrons en avaient été brûlés, détruits et détériorés, qui, sur vente, ne rapportèrent que £1 8 0, lorsque la valeur du charbon, avant le feu, était de £2 10 0. Conclusions au paiement de £1000, montant de l'assurance. Les Appelants plaidèrent que, lorsque l'assurance fut effectuée, il n'y avait sur les lieux qu'environ 500 chaudrons de charbon, qui étaient demeurés intacts après le feu ; qu'après l'assurance effectuée, l'Intimé avait fait transporter au même lieu une quantité considérable de charbon non assuré, dont une partie était mouillée et fut entassée pendant les ardeurs de l'été ; que le charbon ainsi entassé à une hauteur déraisonnable, et, en conséquence de son état humide et de la négligence de l'Intimé, avait pris feu, et une petite partie en avait été endommagée, et que les assureurs ne pouvaient être tenus des accidents en semblables circonstances. L'enquête établit la quantité de charbon qui a été détériorée par la combustion spontanée, le prix du marché, et le produit de la vente du charbon endommagé. La Cour Supérieure, nonobstant la défense des Appelants, prononça jugement contre eux ; et cette décision a été confirmée par la Cour d'Appel. (9 *D. T. B. C.*, p. 448.)

H. STUART, pour les Appelants.

DAVID et RAMSAY, pour l'Intimé.

ASSURANCE.—FRAUDE.

COUR SUPÉRIEURE, Montréal, 18 novembre 1859.

Présent : MONK, Juge-Assistant.

Ex parte SPIERS, Requérant, *et* LE PROCUREUR-GÉNÉRAL *pro Regina*, Réclamant, *et* O'CONNELL et al., Réclamants.

Jugé : Que le montant d'une police d'assurance sur la vie du mari, dont les primes ont été par lui payées, et qui a été perçu par le curateur à sa succession vacante par suite de déconfiture, peut néanmoins être réclamé au profit de sa femme, par deux fidéicommissaires qui ont accepté la donation du montant de cette police d'assurance, faite par le contrat de mariage, pour remettre les revenus à la femme, et le principal aux enfants, nonobstant que cette donation et cession n'ait pas été inscrite sur les livres de la compagnie, une notification en ayant été donnée dans un lieu autre que celui où l'assurance a été effectuée. (1)

John Spiers, fut nommé, le 16 mai 1855, curateur à la succession vacante de Donald S. Stuart ; en cette qualité, il réalisa les biens et créances du défunt, et, par sa requête, tout en rendant compte des deniers réalisés, il demandait à la cour

(1) V. art. 1034, 1035 et 1265 C. C.

la permission d'appeler les créanciers de Stuart, pour leur distribuer les deniers réalisés, se montant à £740 17 10. Parmi ces deniers, se trouvait une somme de £500, reçue par le curateur de la Compagnie d'Assurance du Canada, pour le montant d'une police d'assurance sur la vie de Stuart, et £25 8, prime sur le montant de la dite assurance. Au nombre des réclamations produites s'en trouvait une par le procureur général, pour la somme de £701 15 9, reliquat de compte dû au gouvernement par Stuart, comme inspecteur du revenu, et restant ainsi dû au jour du décès de Stuart, laquelle somme était réclamée par privilège sur les biens du comptable, comme créance du fisc. Deux autres réclamations furent aussi faites, l'une par Eliza C. O'Connell, pour meubles à elle appartenant, et pour une somme d'argent qu'elle devait toucher sur les biens du défunt ; l'autre était faite par Edward O'Connell et Alexander Fraser sous les circonstances suivantes : Par contrat de mariage, reçu à Ste-Foy, le 19 décembre 1854, Glackemeyer, notaire, Stuart et Eliza C. O'Connell, firent des accords et conventions, en vue de mariage, stipulant exclusion de communauté et séparation de biens. Stuart s'obligeait de plus de donner à la future une somme de £500, payable à sa demande, puis l'acte continue : " And, also a sum " of £500, which he has insured on his own life, at the " Canada Life Insurance Company, under policy number " 345, dated at Montreal, the 30th day of the month of " April, 1849, and which policy of insurance Stuart hath " now transferred, assigned and made over, unto Edward " O'Connell, of the parish of Ste-Foy, gentleman, and Alexander " Fraser, of the city of Quebec, book-keeper, hereunto present " and accepting thereof, in trust for Eliza Catherine O'Connell, " and of the children which may issue of said mariage *the lat-* " *ter* (D. S. Stuart) *binding himself towards said trustees to* " *pay the yearly premium required to keep in force said policy* " *of insurance on his life until his decease.*" Le 6 février 1855, Edward O'Connell et Alexander Fraser firent signifier un avis notarié du transport contenu dans la clause ci-dessus à H. W. Welch, agent, à Québec, de la Compagnie d'Assurance. La police portant le No 345, porte qu'elle est faite en faveur de Marianne Stuart (première femme de Stuart) sur la vie de son mari, la Compagnie d'Assurance s'obligeant de payer au décès de Stuart, à Marianne Stuart, ses exécuteurs, administrateurs, cessionnaires ou ayants cause, la somme de £500, moyennant une prime annuelle de £19 5 5, payable à la compagnie. Les réclamants, O'Connell et Fraser, alléguaient dans leur réclamation que Marianne Stuart est décédée le 1er novembre 1850, et, qu'après son décès, et du consentement de la Compagnie d'Assurance, Stuart *continua à payer la prime d'assurance*

sur la police susdite, pour son propre bénéfice et celui de ses ayants cause, jusqu'à son décès, arrivé le 1er avril 1855. Edward O Connell et Alexander Fraser concluaient à ce que la somme de £500, montant de la police, que le curateur avait touchée, leur fut payée, par préférence à tous les autres créanciers de Stuart, et fut déclarée leur appartenir, et non sujette aux réclamations des créanciers de Stuart. Le protonotaire fit un rapport, qu'il produit le 4 mai 1857, et par lequel, on lit la collocation suivante : " 4° To the Receiver General of Her Majesty, the amount claimed, in her behalf, by the Hon. G. E Cartier, Her Attorney General, for monies collected by D. S. Stuart, for Her Majesty, in his capacity of revenue inspector, and for which he had not accounted at the time of his decease £701 15 9." Le rapport continue : " The claim of Edward O'Connell, and " *consorts*, is not collocated, inasmuch as the amount of life in- " surance by them claimed, having been secured by the pay- " ments of premiums, by Stuart, said amount must be consi- " dered as belonging to the estate of Stuart." Edward O'Connell et Alexander Fraser contestaient le rapport de distribution, concluant à ce que la somme de £500 fut retranchée de la collocation faite en faveur du receveur général, et leur fut payée. Le procureur général répondit à cette contestation qu'elle devait être renvoyée : 1° parce que la police d'assurance mentionnée au contrat de mariage des dits Stuart et Eliza C. O'Connell est décrite comme ayant été une police d'assurance effectuée par Stuart en son propre nom, tandis que la police dont le curateur avait touché le montant, était faite au nom de Marianne Stuart ; 2° parce qu'au temps du transport de la police mentionnée en la contestation, Stuart était défalcataire envers la Reine d'une somme excédant le montant de cette police, et que ce transport était en fraude de la Reine ; 3° parce que le curateur avait touché cette somme sur un jugement qu'il avait obtenu contre la compagnie d'assurance, sur une poursuite intentée à cette fin, à la connaissance des dits O'Connell et Fraser, qui n'y étaient pas intervenus ; 4° parce qu'il n'y avait eu aucun transport légal et valide de cette police, sur les livres de la compagnie, et qu'au temps de la signification à la compagnie de la cession de police en faveur de la dite Eliza C. O'Connell, Stuart était insolvable et endetté à S. M., en une somme excédant le montant de la police, pour deniers perçus par Stuart en qualité d'inspecteur du revenu, et que cette signification était ainsi en fraude de S. M. Une admission produite par O'Connell et Fraser, constate qu'au temps de son décès, et même plusieurs mois avant, Stuart était dans un état d'insolvabilité complète.

La Cour Supérieure prononça le jugement qui suit : The court doth maintain the contestation of Eliza C. O'Connell,

Edward O'Connell and Alexander Fraser. And it is ordered that the sum of £705 19 1, amount of the 4th item of the report of distribution reserved for adjudication, be paid and distributed as follows, to wit: to Edward O'Connell and Alexander Fraser, the amount claimed by them as the amount of a certain policy of assurance effected on the life of Donald S. Stuart, as trustees appointed and empowered under the marriage contract of Stuart with Eliza Catherine O'Connell, executed before Glackmeyer and colleagues, notaries, on the 19th December, 1854, to claim and receive said sum, in trust for Eliza C. O'Connell, as set forth in the said contract of marriage the sum of £500 0 0. (9 *D. T. B. C.*, p. 450.)

C. J. DUNLOP, pour le procureur général.

H. STUART, pour O'Connell *et al.*

PROCEDURE.—SAISE D'IMMEUBLE.

BANC DE LA REINE, EN APPEL, Montréal, 2 déc. 1859.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL, MEREDITH et C. MONDELET, Juges.

PALLISER, Appelant, *et* ROY dit LAPENSÉE, Intimée.

Jugé : Que le shérif qui reçoit plusieurs brefs d'exécution contre les immeubles d'un même Défendeur, doit faire faire un procès-verbal de saisie en chaque cause et ne peut faire un procès-verbal commun en unissant les différentes causes. (1)

AYLWIN, Juge, *dissentiente :* The question is this : two separate judgments were obtained by different parties against Respondents, writs of execution were issued in both causes against the lands of Defendant, and lodged with the sheriff, but the sale did not take place. Subsequently, *alias* writs were issued commanding the sheriff to sell the lands seized under former writs. An opposition is fyled by Defendant, inasmuch as only one of the two judgments has been executed, there being only one *procès-verbal.* He complains also of the description given of the property seized as being insufficient, on this last point, the court is unanimously of opinion that it is no ground of complaint in Defendant. But on the first point, I differ from the majority of the court. The record is not in such a state as to enable this court to adjudicate upon the contestation. The two causes are *connexes* ; the sheriff had two writs to execute simultaneously, and the record itself refers to the other cause which we have not before us. It was the business of Appellant to see that the record should come

(1) V. art. 642 C. P. C.

before us in a complete state; he not having done so, I conceive that this court should order the thing to be done. Now, coming to the question as to the validity of the judgment appealed from, which treats as a nullity the act of the sheriff, I would ask, where is the law which pronounces this nullity? At the argument the Respondent was required to furnish authorities in support of his pretension. The ordinance of 1667, tit. 33, art. 3, was referred to; but this article has no application to the seizure of lands, but only to the seizure of moveables. We are, therefore, without any precise law on the point, and the courts of justice have no power to declare an act null and void without special provision of law on the matter. How then are we to treat the *procédure* in this case? The mode of proceeding with an officer such as the sheriff must necessarily differ from that followed in France, and this difference dates as far back as the change of government in Canada. Instead of the *bail judiciaire*, and other proceedings used in the french courts, the execution is intrusted to an officer unknown to the french system, his conduct is prescribed by the statute, and it would be almost impossible to require that he should follow the prescriptions of the old *procédure*. The *writ* is unknown in the french law. The sheriff is an officer representing the court; he is a public officer executing *privativement à tous autres*; while in France the *huissier* represented only the party who employed him. In Upper Canada, where real property is sold by the sheriff, upon several executions, there is but one advertisement in the *gazette*, in which all the suits and all the Plaintiffs are named. In the district of Montreal, the same pratice has been pursued, to the manifest saving of expense, as one single *rapport de distribution de deniers* suffices to marshall all the creditors. I see no inconvenience in this mode of proceeding, and even an advantage, as tending to repress such *opposition à fin d'annuler* as that in this case, for, unless the opposition goes to both writs and in both cases, the sheriff would still proceed to a sale without delaying Plaintiff. But even the argument *ab inconveniente*, if capable of being urged upon a foundation of fact, would not induce me to change the usage which has prevailed in the sheriff's office. In Lower Canada we have the rule, *saisie sur saisie ne vaut*. Where is the law which enacts that the sheriff shall make as many *procès-verbaux* as there are writs? I know of none; and, in the absence of such a positive law, there is no court authorized to say that the mode followed up by the sheriff is null and void, the legislature alone has the power to declare what shall be a nullity. For these reasons, I cannot concur in the judgment of the majority of the court.

Sir L. H. LaFontaine, Bart, Juge-en-Chef: Deux juge-

ments ont été obtenus chacun pour £125, contre le Défendeur qui est maintenant Opposant *à fin d'annuler* dans deux causes distinctes et non jointes à aucun étage des procédures, l'une à la poursuite de Janet Sanderson, et l'autre à la poursuite de Thomas Palliser. Ces deux jugements paraissent avoir été suivis de deux brefs d'exécution qui ne sont pas au dossier, mais en vertu desquels il a été procédé à la saisie de l'immeuble dont il s'agit. Il n'y a qu'un seul procès-verbal de saisie, bien qu'en tête il donne les titres des deux causes. Ce procès-verbal est daté du 15 janvier 1858. L'huissier saisissant commence par déclarer qu'il a procédé, "en vertu de deux warrants du shérif datés tous les deux du 5 janvier 1858, fondés aussi tous les deux sur deux brefs de saisie exécution, datés tous les deux du 29e jour de mai 1857." Il n'a fait qu'un seul commandement de payer, lequel comprend le montant réuni des deux jugements, au lieu de faire, au nom du Demandeur dans chaque cause, un commandement de lui payer seulement la somme précise qui lui était due. N'y ayant pas eu de vente en vertu de ces deux premiers brefs d'exécution, ils furent rapportés au tribunal de première instance. Plus tard, le 20 février 1858, chacun des Demandeurs fit émaner un *alias* bref d'exécution ordonnant au shérif de prélever, par la vente du fonds par lui déjà saisi, la somme due à chaque Demandeur respectivement. Le shérif paraît avoir adopté les procédés préparatoires pour parvenir à cette vente. Mais deux oppositions à fin d'annuler faites au nom du Défendeur, une dans chaque cause, sont logées au bureau du shérif qui les produit devant la Cour Supérieure, en ne les accompagnant que d'un seul et même rapport, en date du 9 juin 1858, fait sur une feuille détachée, non annexée aux brefs d'exécution, dans lequel rapport il allègue qu'en obéissance à ces brefs, il a fait les publications nécessaires pour la vente du fonds par lui déjà saisi. Les deux oppositions du Défendeur concluent à la nullité de la saisie, parce qu'il n'y a pas eu deux actes séparés de saisie, et parce qu'au lieu d'un seul procès-verbal il aurait dû y en avoir deux. Ces oppositions ont été contestées par les deux Demandeurs, chacun séparément. Deux jugements sont intervenus le 31 décembre 1858, donnant au Défendeur mainlevée de la saisie. Le Défendeur se plaignait aussi, dans ses oppositions, de ce que la désignation de sa propriété n'était pas suffisante. Si un seul procès-verbal doit rendre la saisie valable, cette plainte du Défendeur devient tout à fait futile en présence de sa signature à ce procès-verbal, sans aucune protestation de sa part. La seule question est donc celle de savoir s'il devait y avoir deux saisies, deux procès-verbaux, et deux avertissements distincts dans la *Gazette officielle*: à l'exception de ces trois actes de procédure,

et du rapport qu'en a fait le shérif, tous les autres ont été disjoints. Le statut provincial de 1836, ch. 15, contient la disposition suivante : " Le procès-verbal de saisie sera annexé à chaque retour de saisie d'aucuns biens et effets ou terres et immeubles, et renfermera un inventaire exact et détaillé des biens et effets, et une description légale des biens et immeubles qui auront été saisis." Et par la 18e section, lorsqu'il y a plusieurs Demandeurs ou plusieurs Défendeurs mentionnés dans un bref d'exécution, ou lorsque les parties sont en jugement en qualité de tuteurs, il est suffisant que l'avertissement du shérif mentionne le premier Demandeur et le premier Défendeur, déclarant en même temps qu'il y a d'autres Demandeurs ou d'autres Défendeurs, et que, dans l'autre cas, l'avertissement " déclare que tel tuteur est tuteur aux enfants mineurs de la personne décédée," sans spécifier au long les noms de tels enfants mineurs. La première de ces dispositions, celle qui est relative au procès-verbal, doit s'entendre évidemment d'un procès-verbal comme étant exigé sur chaque saisie qui est pratiquée. Dans l'espèce, il y avait deux titres exécutoires distincts l'un de l'autre. Celui émané au nom de Palliser ne commandait pas et ne pouvait pas commander au shérif d'exécuter celui émané au nom de Sanderson, et *vice versa*. Le jugement dont il est fait mention au dos de l'un des brefs d'exécution, aux termes de la 30e section de l'ordonnance de 1785, n'est pas le jugement qui est mentionné au dos de l'autre. La saisie ne pouvait donc être faite sous la même autorité. Il devait donc y avoir deux saisies et deux *retours* de saisie. Tout *retour* de saisie devant être accompagné, lorsqu'il est fait au tribunal, d'un procès-verbal de la saisie, il s'ensuit que, dans l'espèce, il devait y avoir deux procès-verbaux de saisie, un pour chaque cause : sans cela, la procédure, dans l'une de ces deux causes, qui sont disjointes, est incomplète. Au dossier de l'une d'elles, il n'y a pas de procès-verbal de saisie, il ne peut pas y en avoir. La suggestion qui a été faite qu'on peut regarder le procès-verbal comme commun aux deux causes, ne me paraît pas une suggestion qui puisse être accueillie. D'abord, elle n'aurait pas l'effet de compléter le dossier de l'une d'elles. Puis, supposons une opposition à fin d'annuler faite dans une seule cause, avec laquelle le shérif rapporte l'unique procès-verbal qui existe, puis cette opposition après un premier jugement portée en Cour d'Appel, il est facile de concevoir que le Defendeur pourrait se pourvoir contre la saisie, en autant qu'elle se rapporterait à l'autre cause, par une autre opposition à fin d'annuler, fondée sur le défaut ou l'absence du procès-verbal, et, par là, arrêter toute la procédure de cette cause jusqu'au retour du dossier de la cause en appel, et même, après ce retour, le dossier de l'autre cause restera toujours incomplet jusqu'à ce qu'on trouve le moyen de faire sor-

tir le procès-verbal de saisie de l'un des dossiers pour le faire entrer régulièrement dans l'autre. L'une des parties serait donc, sans qu'il y eût de sa faute, soumise à des délais indéfinis. Ainsi, je suis porté à dire que, dans l'état de notre législation sur la matière, législation qu'il serait peut-être désirable de modifier, il aurait dû y avoir deux commandements de payer, deux saisies et deux procès-verbaux de saisie. Je regrette en quelque sorte d'avoir été obligé d'en venir à cette conclusion, car la position du Défendeur est bien loin d'être favorable, lui qui a signé le procès-verbal de saisie sans aucune protestation. Quant à l'avertissement qui doit être publié dans la *Gazette officielle*, et qui, dans l'espèce, a été fait par un seul et même acte, il ne me semble pas entraîner les mêmes inconvénients que ceux que j'ai signalés plus haut. Rien n'empêche le shérif d'en produire au besoin des duplicata, dans les deux causes, et par là de rendre complets les deux dossiers. Si le Défendeur fait une opposition dans l'une des deux causes seulement, son autorité de procéder à la vente est bien suspendue, il est vrai, quant à cette cause ; mais il me semble que, dans ce cas, son autorité relativement à l'autre cause ne doit pas être affectée et reste entière. L'absence de l'original du procès-verbal de saisie du dossier, tel que présenté en appel, ne saurait être, dans les circonstances, une objection valable. Le Défendeur, en en produisant lui-même la copie dûment certifiée qui lui a été signifiée, est venu au secours du Demandeur.

MONDELET, Juge : L'article de l'ordonnance de 1667 qui a été cité ne s'applique directement, il est vrai, qu'à la saisie des meubles, mais, comme le cas est analogue, je ne vois pas pourquoi sa disposition ne s'étendrait pas également à la saisie des immeubles.

DUVAL, Juge : Le shérif est un officier subordonné de la cour, et certainement que ce que la cour de première instance ne pouvait faire, cet officier subordonné ne le pouvait davantage. Or, il n'y a pas de doute que la cour de première instance n'aurait pu ordonner la jonction des deux causes ; de quel droit alors le shérif viendra-t-il l'imposer aux parties ? Quant à l'article cité de l'ordonnance de 1667, je suis également d'opinion qu'il est applicable à la saisie des immeubles et que le shérif était tenu de faire un procès-verbal distinct, dans chaque cause.

Le jugement de la Cour Supérieure de Montréal, était comme suit : " La cour, considérant que, quoiqu'il y eût deux saisies-exécutions émanées contre le Défendeur, il n'y avait qu'un seul procès-verbal de saisie, maintient la dite opposition ; en conséquence, accorde mainlevée au dit Opposant de la saisie de l'immeuble saisi en vertu de deux brefs de saisie

exécution, dont l'un émané à la poursuite du Demandeur contre le Défendeur, et l'autre dans une cause portant le No 6, et dans laquelle Janet Sanderson était Demanderesse contre le Défendeur.

La Cour d'Appel a confirmé ce jugement (9 *D. T. B. C.*, p. 456, et 4 *J.*, p. 208).

MORISON, pour l'Appelant.

LORANGER FRÈRES, pour l'Intimé.

CORPORATION MUNICIPALE.—RESPONSABILITE.

SUPERIOR COURT, Montréal, 30 avril 1859.

Before SMITH, Justice.

CARSON et al., Plaintiffs, *vs.* THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MONTREAL, Defendants.

Jugé : Que la corporation de la cité de Montréal est responsable pour dommages causés par l'entrée d'un attroupement dans la maison du Demandeur, et y brisant les châssis et les meubles, et répandant des boissons.

The Plaintiff's declaration alleged Defendants to be a body corporate, and that they," as such body corporate, were, by " law, entrusted with the preservation of public peace, and " the protection of the lives and property of persons being " and situate within the limits of the city of Montreal, and " were, by law, liable for any injury and damage sustained " in consequence of any riotous or illegal conduct of persons " riotously assembled together, and for any loss or destruction " of property occasioned by any mob or tumultuous assemblage " of persons in the city of Montreal." The declaration then set forth the damage to extent of £90, done by a mob to Plaintiff's furniture and effects, in their house, within the city, on the 13th July, 1857 : that Plaintiffs had notified Defendants of the loss, and that, although six months had lapsed since the destruction of the property," Defendants have, contrary " to the form of the statute in such case made and provided, " omitted to exercise the power in them vested by law, and " to provide by special assessment to defray the loss, by reason " whereof, and, by law, an action hath accrued to Plaintiffs " against Defendants, to recover the amount of such loss." Plea : *défense au fond en fait.*

SMITH, Justice : There can be no doubt that Defendants are liable to pay the amount of damage occasioned by the riotous assembly referred to in the evidence, which took place in connection with an orange ball then held in the oddfellows hall in this city. It would appear that the mob broke into the house

of Plaintiffs destroying the windows, breaking furniture and spilling liquors. The question is as to the amount of the damage, the amount which the Defendants were willing to pay is not sufficient. I add £10 to that amount, and give judgment for £28 18 11.

JUDGMENT: "Considering that Plaintiffs have established "the material allegations of their declaration, and that they "have suffered damage to the extent of £28 18 11, by reason "of the grievances set out in the said declaration, doth condemn "Defendants to pay, etc." (9 *D. T. B. C.*, p. 463.)

CARTER, Ed., for Plaintiffs.

PAPIN, for Defendants.

NOTE: See 14 and 15 Vict., ch. 128, sec. 58, giving power to the council to pass a by-law: "To impose a special assessment over and above all other "rates or assessments which the said council are empowered to impose, to "defray and meet the expenses of any building, or buildings or other property "whatsoever that may be demolished, destroyed, injured, damaged or deteri-"orated in value, by any mob, tumultuous assemblage, of riotous persons "whomsoever in the said city; provided, that in the event of the demolition, "destruction, injury or damage to any property in the said city by any mob "or tumultuous assembly, if the said council omit to provide, by such special "assessment, to defray the expense thereof within six months after the "destruction or injury of the said property, then the said council shall be "liable to pay the same, and the proprietors of the property destroyed or "injured may recover the amount or value thereof by action against the said "council."

ASSIGNATION.

SUPERIOR COURT, Montreal, 26th February, 1859.

Coram BADGLEY, Justice.

THE TRUST AND LOAN COMPANY OF UPPER CANADA, *vs.* MACKAY et vir.

Held: 1° That the temporary absence of a wife *séparée de biens* does not render illegal the service of a writ of summons on her at the domicile of her husband.

2° That the service must be made by delivering the writ to the Defendant or at her domicile to some person for her and the return must state to whom speaking in terms of the ordinance of 1667, tit. 2, art. 3. (1).

BADGLEY, J.: The point raised by the exception *à la forme* is the sufficiency of the service upon Mrs. Mackay, *séparée de biens*, from her husband. The service of the copies of the writ and declaration was duly made upon the husband, who, at the time, informed the officer of the absence of Mrs. Mackay from town. The bailiff did not then serve a similar

(1) V. art. 67 C. P. C.

copy intended for her. The next day, however, another bailiff was sent with it to her residence, but the husband answered the door upon the occasion, and, seeing the officer, immediately closed the door, without giving him time to state his errand, the copy intended for her was thereupon left upon the floor of the open porch outside of the house, and the bailiff returned his service upon her as follows: " I, the under-" signed Robert McCormick, &c., do hereby certify and return, " under my oath of office, to this honorable court, that on the " eleventh day of November 1858, between the hours of " twelve and one of the clock in the afternoon, I did summon " Dame Mackay, one of the within named Defendants, to be " and appear on the day and at the place within mentioned, " to answer as the within original writ of summons demands " and requires by speaking to and leaving a true certified " copy thereof, together with a copy of the annexed declara-" tion, thereunto annexed, with a grown person of her family, " at her domicile, &c." The exception meets the return and rests upon two grounds. 1st. Her absence, at the time of the alleged service, and 2nd, the absolute want of service upon her. Defendant has foreclosed Plaintiffs from pleading and from evidence, and has been allowed to proceed ex parte; at the close of the *enquête* Plaintiff inscribed the case for hearing, under the 33rd rule of practice, without answer to the exception. The evidence establishes the merely temporary absence of Mrs. Mackay from her residence, whilst it proves the falsity of the return. The serving bailliff's testimony is: " The " house to which I went to make the service is in on Sher-" brooke street. It has a porch in front of it into which I " entered. Mr. Mackay came to the door, and as soon as he " saw me, he shut the door without waiting for the end of " my speech. I told him through the door that I would leave " the process for Mrs. Mackay on the floor of the porch, which " I did. That is all that passed. I cannot say to a certainty " whether Mr. Mackay heard what I said through the door."

The practice rule which authorized Plaintiff's inscription without answer, also expressly ruled *that every Plaintiff, for the purpose of such hearing, shall be held to confess the allegations contained in such exceptions.* Defendant's evidence disproves the bailiff's return, the allegations of the exception deny its truth, and Plaintiff's acquiescence with the pleading and evidence, and his enforced confession under the rule of the allegations contained of the denial, sustain the exception *à la forme* and in effect, dismiss the action. It is proper, however, to add a few words upon the two grounds taken by Defendant, in so far as they are governed by law. The first, the absence of the wife, is untenable, upon every principle,

she is only *séparée de biens*, and her absence was merely temporary, her husband's domicile was hers, as long as she was only *séparée quant aux biens*; this point is settled in 1 Bourjon, p. 107-8." La dépendance de la femme est toujours la " même, si la puissance du mari sur ces biens est affaiblie : " ainsi, dans ce cas, la femme n'a d'autre domicile que celui de " son mari, cette séparation ne lui est accordée que pour la " conservation de son bien, tant pour elle que pour son mari " lui-même, et, sans donner atteinte à la juste et inévitable " dépendance de la femme, mais, autrement, si elle est séparée " de corps et d'habitation, alors le domicile de son mari cesse " d'être le sien." See 2 Biret, *Des nullités*, p. 25. Plaintiff did not except to the proceeding adopted by Defendant, upon the ground of an *inscription en faux*, being the proper course, and which appears in any case to be inapplicable to our bailiff's returns, under our system of jurisprudence and present practice, generally adopted in this district, for several years past, as most convenient and practical as well as legal, whatever may have been the practice in old France, where oral testimony was not favoured, where *huissiers* and *sergents* were appointed by letters patent and whose offices were " charges vénales," and where a different course of practice and judicial proceeding prevailed. It would be singularly ridiculous to require the *inscription en faux* against all bailiff's returns at this time, including bailiffs of commissioners, Circuit and Superior Courts, in no way assimilated with the huissiers of old France, and not only in matters of writs, but of motions, notices, bills of costs, &c., why should any distinction be made between these, yet they all are services and returns. The second point falls within the requirements of the ord. of 1667, t. 1, art. 3, which requires that " tous exploits d'ajournement seront faits à personne ou domicile, et sera fait mention des personnes auxquelles ils auront été laissés, à peine de nullité." The object of this law was to intimate to the party sued the nature of the proceeding adopted against him, hence, not only must a *remise* be made *à personne ou domicile*, but the return must also declare the person *parlant à qui*, to whom the *remise* was made. Without these requirements, a mere verbal service must have sufficed, and courts of justice might innocently commit great injustice, 1 *Carré* and *Chauveau*, p. 401 observes," il " nous paraît que, d'après l'esprit de la loi, ce n'est pas dans " un avertissement oral que consiste la signification de l'ex- " ploit, la remise de la copie est une partie essentielle, afin que, " demeurant entre les mains de l'assigné, elle puisse former " son titre et lui servir à proposer les nullités dont ce titre " pourrait être vicié ; or la remise de la copie étant indis- " pensable, la mention de cette remise l'est aussi : car l'exploit

" doit former la preuve de l'accomplissement de toutes les " formalités," Cour de Cassation, 3 novembre 1818. The old french law, under the ordinance of 1667, and the modern law of France, under the *Code de procédure*, are entirely similar in this matter with similar nullities sanctioning similar practice and decisions, all sustaining the principle that the *exploit* should reach the knowledge of the *partie assignée*." Il faut " que l'assignation parvienne nécessairement à celui qu'elle " concerne, il faut, de plus, que le juge puisse être moralement " assuré qu'il en a eu connaissance ; de là, la nécessité imposée " à l'huissier de mettre à personne ou domicile, 7 Prost. de " Royer, p. 571." The same author, at a previous page, 741, observes. " Les motifs de cette jurisprudence sont évidents, " on exige qu'il soit fait mention de la personne à qui l'exploit " a été laissé, afin que, si la partie assignée ne se présente pas, " le juge avant que d'octroyer défaut puisse s'assurer, par la " preuve même qui en est consignée dans l'acte, que l'assigna- " tion a été remise à cette partie, soit à personne ou domicile, " de manière qu'elle ait pu en avoir connaissance." The party by these legal precautions is protected against surprise. But it has been objected that Defendant's appearance in the cause covers the nullity, and that all the advantage contemplated by the law in her favor, must be considered as having been secured to her from the mere fact of her *comparution*. This was the jurisprudence anterior to the ordinance of 1667, and the opinions of Hubert, Mazuer and Fontanon were sustained by a general practice. They say " l'effet de l'ajournement, est " la comparution de la partie ajournée : que l'ajournement, nul " par quelque défectuosité, si la partie est comparue en vertu " d'icelui, et est parvenu à l'effet et cause finale qui lui est " propre, conséquemment, la nullité est couverte, et l'acte " valable *non ratione citationis sed ratione presentiæ*." But, the authors object to this jurisprudence that nullities can only be proposed after appearance in the cause, that, in this, there is nothing contrary to the natural order of legal ideas, that it is in conformity with the jurisprudence, as well of the ordinance as of the Code de procédure, and that, ortherwise, expensive and tedious litigation would follow, and that Defendants would lay by until after judgment rendered, when the whole of the proceedings might be set aside, with heavy expenses and great delay, hence, therefore, both in justice and in law, " on raisonne avec moins de rigidité, et l'on admet le Défen- " deur à venir de prime abord dire, l'assignation est nulle, etc., " ce système est moins positif que celui des temps qui pré- " cédèrent l'ordonnance. Toutefois il est conçu d'une manière " plus humaine et plus secourable, etc.," removing difficulties and preventing expenses, and, at the same time, keeping with-

in the conclusion of the ordinance that all such defective assignations were nullities," parce que les règles prescrites " pour lui en assurer la remise n'ont pas été strictement obser- " vées," 2 *Carré* and *Chauveau*, p. 215, and seq. who cite Boncenne, Boitard and 1 Pigeau, p. 493; see also 1 *Carré* and *Chauveau*, p. 456, quest. 374. A proper service is essential in all cases; in this case, it has not been made upon Mrs. Mackay, the law is precise as regards the *femme séparée de biens*. A service must be made upon her, that upon her husband is legally ineffective to bind her, 4 Bioche *Dictionnaire de procédure*, vbo *Femme mariée*, p. 291. " L'assigation à deux époux séparés de biens doit à peine de nullité leur être donnée par copies séparées, alors même que la signification en est faite au domicile par eux élu chez un mandataire commun." Also, 1 *Carré* and *Chauveau*, p. 398 (348 *bis*), " puisque la copie est destinée à avertir les parties &c.," there must be as many copies, *à peine de nullité*, as parties, this is the general principle, and, in the particular case of the *femme séparée*; the authors at pp. 399, 400, declare in reply to the question of the sufficiency of conjoint service upon husband and wife, by one copy, that by " une jurisprudence unanime, viz: in case of the *époux* being *communs en biens* and the action having reference to *biens de la communauté*, they are held in law to be *une seule et même personne*, and the service by one copy is valid; but," où les époux son séparés de biens et il s'agit dans la contestation soit de biens qui leur appartiennent par indivis, soit de biens particuliers à la femme, en sorte que le mari ne figure que pour l'autorisation, dans ce cas, leurs intérêts sont distincts: les copies doivent être séparées." Prost. de Royer, p. 518, vbo *Assignation*, to the same effect; other authorities may be added, but these suffice, Pigeau's citation does not apply to this case. The bailiff's return is a falsehood and a nullity, and the exception *à la forme*, must be maintained which dismiss the action with costs. Action dismissed. (3 *J.*, p. 154.)

HENRY JUDAH, for Plaintiffs.

HENRY W. AUSTIN, for Defendant.

PREUVE.—ASSIGNATION.—INSCRIPTION DE FAUX.

BANC DE LA REINE, EN APPEL, Montréal, 1 décembre 1859.

Présents : Sir L. H. LAFONTAINE, Bart, Juge-en-Chef, AYLWIN, DUVAL, MEREDITH et C. MONDELET, Juges.

THE TRUST AND LOAN COMPANY OF UPPER CANADA, Appellants, *et* CHRISTIANA MACKAY, Intimée.

Jugé : 1° Qu'un exploit d'huissier est un acte authentique qui fait foi jusqu'à inscription en faux. (1)

2° Qu'aucune preuve à l'encontre d'un tel exploit ne peut être permise sans cette inscription en faux. (2)

3° Que sur une assignation, la signification d'une seule copie de l'ordre et de la déclaration suffit pour l'ajournement des deux conjoints, tant du mari que de la femme séparée de biens. (3)

Jugement : La cour, 1° attendu que l'exploit d'ajournement est un acte authentique qui fait pleine foi de toutes les énonciations relatives aux faits que l'huissier a mandat et qualité de constater ; 2° attendu que la présomption légale, aux termes du droit commun, est en faveur de l'exploit de l'huissier et de la suffisance de l'ajournement ; 3° vu qu'il appert par l'exploit de l'huissier McCormick qu'il a signifié l'ordre et la déclaration en cette cause à l'Intimée Christiana McKay, épouse de Robert MacKay, l'Intimé, en en laissant de vraies copies dûment certifiées à son domicile, parlant à une personne raisonnable, faisant partie de la famille ; 4° vu que la signification d'une seule copie de l'ordre et de la déclaration suffit pour l'ajournement des deux conjoints tant du mari que de la femme séparée de biens ; 5° vu qu'il est de principe que l'huissier doit être cru dans sa déclaration jusqu'à inscription de faux ; 6° attendu que l'Intimée tout en alléguant la fausseté de la déclaration du dit huissier, par son exception à la forme, ne s'est pas inscrite en faux contre l'exploit, et que partant, la preuve testimoniale produite de sa part à l'appui de la dite exception à l'encontre de l'exploit est inadmissible et irrégulière, et que la Cour Supérieure en adoptant ce genre de preuve pour prononcer la nullité de l'ajournement et le renvoi en conséquence de la demande de la partie appelante, a mal jugé. Il est considéré et adjugé que le jugement dont est appel, rendu par la Cour Supérieure, à Montréal, le 26 février dernier, soit et il est par ces présentes infirmé, annulé et mis au néant. Et cette cour, procédant à rendre le jugement que la dite Cour

(1) V. art. 1207 C. C.

(2) V. art. 1234 C. C. et 79 et 159 C. P. C.

(3) V. art. 67 C. P. C.

Supérieure aurait dû prononcer, déboute l'intimée de sa dite exception à la forme, et ordonne que les parties passent outre au fond de la demande. (9 *D. T. B. C.*, p. 465.)

JUDAH, H., pour les Appelants.

LUNN, A. H., pour l'Intimée.

ASSIGNATION.—INSCRIPTION EN FAUX.—ENQUETE.

BANC DE LA REINE, EN APPEL, Québec, 12 janvier 1857.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef, AYLWIN, DUVAL et CARON, Juges.

LA BANQUE DU PEUPLE, Appelante, *et* GUGY, Intimé.

Jugé: Sur une inscription en faux contre le rapport d'assignation et sur une exception à la forme. (1)

1° Qu'une déposition à l'enquête, non attestée par le protonotaire, ne peut valoir.

2° Qu'une pièce produite par une partie à une instance devient commune aux autres parties.

3° Qu'un Défendeur recevant copie d'une assignation renfermée dans une enveloppe cachetée, mais à son adresse ne peut prétendre qu'il a a été dans l'impossibilité de répondre à cette assignation.

4° Que l'inscription en faux contre le rapport de l'huissier qui certifie avoir laissé copie de l'assignation, sans connaître les pièces mises sous enveloppe cachetée, ne peut être maintenue, la production de la dite enveloppe cachetée faisant voir que le rapport est véridique.

5° Que l'exhibition de l'original de l'assignation, dans l'espèce, n'était pas nécessaire.

Cette cause, ainsi que le jugement dont a été interjeté appel, se trouve rapportée dans 5 *R. J. R. Q.*, p. 108.

LA COUR : 1. considérant que le bref de somination émané, le 13 mars 1855, enjoignait à tous et chacun les huissiers de la Cour Supérieure, nommés pour le district de Québec, d'assigner l'Intimé à comparaître devant la Cour Supérieure, le 27 du même mois ; que, dans le rapport de l'huissier Labrecque, écrit au dos du bref, il est énoncé, que le 15e jour du mois de mars, entre 5 et 6 heures P. M., cet huissier a fait à l'Intimé, en parlant à lui-même, la signification du bref et de la déclaration y annexée, en lui en délivrant des copies certifiées, à son domicile en la paroisse de Beauport ; que, si cet énoncé est exact et vrai, comme il doit être censé l'être à première vue, la signification ainsi faite à l'Intimé est régulière et suffisante ; 2. considérant que sur cette assignation, l'Intimé, a dans le délai fixée par la loi, savoir le 28 mars 1855, comparu par ses procureurs dûment constitués, Andrews et Campbell ; 3. considérant que l'Intimé a d'abord présenté une exception pé-

(1) V. art. 79 et 159 C. P. C.

remptoire à la forme dont la substance est qu'aucune signification ne lui a été faite du bref et de la déclaration ; que la dite exception a été suivie d'une inscription en faux de la part de l'Intimé contre le rapport de signification, déclarant le dit Intimé, que la seule preuve qu'il avait à fournir à l'appui de l'exception à la forme était celle qu'il entendait faire sur la dite inscription en faux ; que les moyens de faux articulés par l'Intimé, sont qu'il ne lui a pas été signifié copie du bref ni de la déclaration y annexée, et que l'écrit qui lui a été délivré par le dit huissier, n'est pas une copie du bref ou de la déclaration y annexée, et que le dit huissier ne lui a en aucun temps exhibé les originaux des dits brefs de sommation et déclaration ; 4. considérant que l'Intimé n'a fait entendre que deux témoins à l'appui de son inscription en faux, savoir : le dit huissier Labrecque et M. Lemoine, l'un des procureurs des Appelants ; que le déposition du témoin Labrecque ne peut valoir étant défectueuse, à raison du défaut ou de l'absence de l'attestation du greffier de la Cour Supérieure ; qu'en supposant néanmoins qu'elle pût valoir, il résulterait de la preuve ainsi faite par l'Intimé : 1° que des copies du bref de sommation et de la déclaration dont il s'agit, ont été, suivant l'usage pratiqué entre avocats et procureurs, mises par Lemoine sous une enveloppe qu'il aurait ensuite cachetée, et sur le pli extérieur de laquelle il aurait de sa propre main apposé la suscription suivante : " Col. Gugy " ; 2° que cette enveloppe aurait ensuite été remise par Lemoine, avec les originaux non cachetés, mais ouverts, des dits brefs de sommation et déclaration à l'huissier Plamondon, qui, à son tour, aurait délivré à l'huissier Labrecque la dite enveloppe et les dits originaux ; 3° qu'ensuite l'huissier Labrecque, pour assigner l'Intimé à répondre à la demande des Appelants contenue dans les originaux, dont il était ainsi devenu le porteur, aurait laissé et délivré à l'Intimé personnellement la susdite enveloppe, dans le même état qu'il l'avait lui-même reçue de l'huissier Plamondon ; 4° que n'ayant pas décacheté la dite enveloppe, l'huissier Labrecque n'avait pu voir par lui-même le papier qu'elle contenait, et que, néanmoins dans son rapport, il aurait certifié avoir signifié à l'Intimé des copies des dits bref de sommation et déclaration ; 5° considérant que la vérité ou la fausseté du rapport de signification dépend du contenu de la dite enveloppe, qui est le papier mentionné par l'Intimé dans ses moyens de faux comme lui ayant été remis par l'huissier Labrecque ; que, pour appuyer son inscription de faux, l'Intimé a produit à l'enquête la susdite enveloppe cachetée ; qu'une pièce produite par l'une des parties à une instance, devient commune aux autres parties ; que, sur la demande des Appelants, faite après que la suscription " Col. Gugy " eût été re-

connue par le témoin Lemoine, comme étant de son écriture, le juge présidant aux enquêtes a ordonné que la dite enveloppe fut décachetée et ouverte, lequel ordre a été depuis deux fois confirmé par la dite Cour Supérieure ; qu'il a été là et alors constaté que le contenu de la dite enveloppe n'était autre chose que des copies des originaux des dits bref de sommation et déclaration, lesquelles copies furent reconnues par Lemoine pour être les mêmes qu'il avait lui-même mises sous la dite enveloppe et adressées à l'Intimé comme susdit ; qu'il résulte de ces faits que le rapport de signification, d'après la pièce produite par l'Intimé lui-même, est exacte et vrai ; 6. considérant, de plus, en droit, que l'exhibition à la partie assignée des originaux du bref de sommation et de la déclaration n'est pas requise par la loi ; en fait, qu'il paraît néanmoins que cette exhibition, quoique non requise, aurait été faite à l'Intimé ; que, par conséquent, le moyen de faux que l'Intimé argue de ce prétendu défaut d'exhibition n'a pas le moindre fondement ; 7. considérant que, pour les raisons ci-dessus énoncées, la dite inscription en faux et la dite exception à la forme sont mal fondées ; en outre, que les nullités du genre de celles qu'invoque l'Intimé doivent être " resserrées dans les bornes " qui leur ont été prescrites (1 Pigeau, p. 159) et ne pas être admises, " lorsque les parties ne peuvent s'appliquer les motifs qui les ont fait établir ; " qu'il est évident que dans l'espèce, l'Intimé n'aurait aucune raison de prétendre que, d'après la manière dont l'assignation lui a été donnée, il a été dans l'impossibilité de répondre, prétention qui serait contredite par le fait de sa comparution pure et simple dans le délai fixé par la loi ; 8. considérant enfin que la Cour Supérieure, en déboutant par son jugement, les Appelants de leur action, sur le motif que par la preuve faite sur l'inscription en faux, l'exception à la forme avait été bien et suffisamment établie, a mal jugé. Infirme le dit jugement ; déboute l'Intimé tant de sa dite inscription en faux que de son exception à la forme. Caron, Juge, *dissentiente*. (9 *D. T. B. C.*, p. 483.)

KERR et LEMOINE, pour l'Appelante.

T. R. SMITH, pour l'Intimé.

GARDIEN.—OPPOSITION A FIN DE DISTRAIRE.

SUPERIOR COURT, Quebec, 4th November, 1859.

Before CHABOT, Justice.

SMITH et al., Plaintiffs, *vs.* O'FARRELL, Defendant, *and* COLEMAN, Opposant.

Jugé: Sur défense au fond en droit, qu'un gardien a droit de filer une opposition à une saisie d'effets placés sous sa garde, comme tel gardien à une première saisie. (1)

Coleman filed an opposition *à fin d'annuler* to the seizure of the effects of Defendant, on the ground, that, at the time of the making of the same, and previously thereto, said effects were already under seizure, in virtue of a writ of execution issued in another cause, in which Defendant was also Defendant, and which seizure was still, subsisting and pending; that Opposant became and still was the (*gardien*) of said effects, under such first seizure, and was liable *par corps* to produce the same to answer the judgment in such first suit; and that the second seizure was therefore null. The Plaintiffs demurred to the opposition, alleging that Opposant had no right to the conclusions of his opposition, inasmuch as he did not allege any absolute or qualified right of property in the goods and chattels seized; that he had no interest in preventing the sale; and that Plaintiffs in the first suit were the only parties who had, as seizing creditors, the right to complain of the second seizure.

VANNOVOUS, for Plaintiffs: The guardian has no interest to oppose the sale, the seizure once made: all those who have a right to oppose are enumerated by Pigeau, vol. 1, p. 616 et seq., and the guardian is not included among the number. In page 618, it is clearly laid down that, were the second seizure is more ample than the first, it supersedes it. It has been held, in a case decided only two terms ago (2), that the guardian may prevent the second seizure by force, if necessary, but that the second seizure once made, the guardian could not oppose the sale.

CHABOT, Justice: I am at a loss to conceive how it can be held that the guardian can oppose the second seizure by force, but that, the seizure once made, he losses all his rights, and cannot come before the court and oppose the sale; *Pigeau* states positively that the guardian has a right to oppose the second seizure, and this is more fully laid down by *Carré* and others; the question, therefore, arises: The second seizure once

(1) V. art. 582 et 866 C. P. C.

(2) No 591, *Dutton* vs. *Hutton*, Judgment, 20th May, 1859.

made, cannot the guardian refer to the court for protection, by some means, whether by opposition or otherwise? No, it is said, because he has no interest in doing so, a plea by him alleging the second seizure, would be a valid defence to a *contrainte par corps*.

O'FARRELL, for Opposant: If the guardian can oppose the second seizure by force, he certainly can do so peaceably and by lawful means; besides, there was a sequestration of the goods, at the time of the second seizure, into the hands of the guardian, and were, consequently, in his possession, and not in that of Defendant, how could they, therefore, be seized as in hands of Defendant? The second seizure is therefore null.

VANNOVOUS: The seizure does not transfer the property, and a second seizure can, therefore, be made alleging them as the property of Defendant.

CHABOT, Justice: The question involved here, as to the right of the guardian to oppose a second seizure, presents no difficulty to me, the only hesitation I have in pronouncing upon the point is, that a decision has recently been rendered, in this court, at variance with the opinion I hold; but I cannot concur in the judgment, in the case of *Dastous* vs. *Hutton* referred to; the authorities cited in that case apply to this, and it will be found that the sixth case given in 1 Pigeau, p. 618, exactly refers to the point here, and it is there explicitly laid down that the guardian has a right to oppose a second seizure; it is true, it has been sought to construe the word oppose, mentioned by Pigeau in this paragraph, so as to mean *by force*, but I cannot recognise any distinction between the signification of the word in this paragraph, and that which it conveys generally. The guardian is liable *par corps*, and if he had no right to oppose a second seizure, his position would be an exceedingly painful one. The demurrer must be dismissed. (9 *D. T. B. C.*, p. 495.)

VANNOVOUS, for Plaintiff.

O'FARRELL, for Opposant.

ASSURANCE.—DOUBLE ASSURANCE.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 3rd September, 1858.

Coram Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., CARON, J.

CHALMERS *(Plaintiffs in Court below)*, Appellant, *and* THE MUTUAL FIRE INSURANCE COMPANY OF STANSTEAD AND SHERBROOKE COUNTIES *(Defendants in Court below)*, Respondents.

Held : 1st. That the 23rd section of the Act 4 William IV, ch. 33, respecting double insurances on *houses or buildings*, does not apply to insurances on *goods*.

2nd. That an endorsement on a policy issued under the provisions of said Act, consenting to the removal of the goods insured, from the buildings described in the policy to another building, and signed by the secretary alone is binding on the Company.

This was an appeal from a judgment rendered, by the Superior Court, at Sherbrooke, on the 27th day of March last, Mr. Justice SHORT, in the following words: "The court, considering, among other things, that at the time the goods insured by Defendants, for the loss of which Plaintiff claims to be indemnified by Defendants, were destroyed, said goods were also insured by the Ætna Insurance Company, such last mentioned insurance having been effected by Plaintiff, without the consent in writing of Defendants, as by law required, and without their knowledge, and that, by reason of such double insurance, the policy granted by Defendants to Plaintiff, on which his action in this behalf is founded, became null and void, doth maintain the exceptions of Defendants lastly pleaded in this cause, doth declare the policy so granted by Defendants to Plaintiff, null and void, and doth dismiss the action of Plaintiff in this behalf."

The action in the court below was to recover the sum of £375, amount of a policy of insurance on goods, granted by Respondents, in favor of Appellant, and dated March 24th, 1854. The fire by which the goods were consumed occurred on the 27th of August, 1855. Respondents filed several pleas, but the points chiefly raised by them, and those on which the case mainly turned, were : 1. That the goods had been removed, after the execution of the policy, from the building therein described, to the building in which they were burned, without the consent of Respondents ; 2. That, while the policy was in force, Appellant effected another Insurance for £800 with the Ætna Insurance Company, without the knowledge or consent of Respondents. As respects the first point, an endorsement

had been made on the policy, as follows: "The goods insured "within have been removed to a new building about twenty "rods south of the block of cottages on the depot ground at "Richmond station, where they are to continue insured, the "same as before removal. Sherbrooke, July 21st, 1855. (Signed,) "HOLLIS SMITH, Secretary."

This endorsement Respondents contended should by law have been signed also by the president of the Company, and that not being so signed the policy was voided. The second point turned on the interpretation to be put on the 23rd section of the Act 4 William IV, ch. 33, which is in the following words: "That, if any insurance on any *house or building* "shall be made with the Company, and with any other Insu-"rance Company, or office, or person at the same time, the po-"licy issued by the Company shall be void, unless such "double insurance shall have been agreed to by the direc-"tors, and their consent to the same signified by an endorse-"ment on the policy, signed by the president and secretary." Respondents contending that the expressions used necessarily involved goods insured in buildings, and Appellant, on the other hand, contending that, by the common law of the land, an insurer has a right to insure in as many offices as he likes, without giving any notification whatever to the Insurance Company, with which he originally insures, and the terms of the statute must be strictly interpreted and applied only to cases clearly coming within the precise meaning of the Act.

The judgment of the court below was reversed. The following is the judgment of the Court of Appeals: "The court, considering that the dry goods, crockery, hardware and groceries, the property of Appellant, contained in a store, at Richmond, in the township of Shipton, and mentioned in the indenture or policy of insurance fyled, were, on the 27th day of August, 1855, at Richmond aforesaid, while said indenture or policy of insurance was in full force and effect, destroyed by fire, without the fault or neglect of Appellant: Considering that Appellant hath well and truly performed and fulfilled all the covenants and stipulations to be by him performed and fulfilled, in virtue of said indenture or policy of insurance, and that Appellant had a right subsequently to the making and signing of said indenture or policy of insurance, to have said goods, crockery, hardware and groceries, insured by the Ætna Insurance Company, without obtaining the consent of the Respondents, and was not bound to give the Respondents notice of such subsequent insurance; Considering, further, that the indorsement on the said indenture or policy of insurance allowing Appellant to remove the said dry goods, crockery, hardware and groceries to "a new building about twenty rods

south "of the block of cottages on the depot ground, at Richmond station," was made by competent authority, and is binding on Respondents; and, considering that Respondents have failed to adduce sufficient legal evidence of the material allegations contained in the plea of peremptory exception fyled, and that, by reason of such failure, and of the evidence adduced by Appellant, Appellant had a right to demand from Respondents payment of the sum of £375, Appellant having established that the value of the goods so destroyed by fire exceeded the amount stipulated in his favor, as well by the policy of insurance, signed by Respondents, as by the policy, signed by the Ætna Insurance Company; and that, in consequence, in the judgment pronounced by the court below, on the 27th day of March, 1858, dismissing the action of Appellant there is error: It is considered and adjudged, by the court here, that said judgment of the court below be, and the same is hereby reversed, annulled and made void; and the court here, proceeding to render the judgment which the court below ought to have rendered, doth condemn Respondents to pay and satisfy to Appellant said sum of £375 currency, for the causes in Appellant's declaration mentioned with interest thereon from this day. The Honorable Mr. Justice Aylwin dissenting."

The judgment of the court was delivered by DUVAL, J., who cited the following authorities: Dunlop's, Paley on Agency, p. 161, s. 2; 1 Bell's Com., p. 607 and 478; Pothier, *Mandat*, N° 29, also p. 888, observation générale; Ellis, on Insurance, p. 229, No 5 and No 7.

AYLWIN, J., dissentiens: The statute, under which this Insurance Company has its being, has provided, "that, if any "insurance on any *house or building* shall be made with the "Company, and with any other insurance Company, or office, "or person at the same time, the policy issued by the Compa- "ny shall be void, unless such double Insurance shall have "been agreed to by the directors, and their consent to the "same signified by an endorsement on the policy, signed by "the president and secretary." This enactment is a condition implied in every risk taken by the Company, and forms part of the contract with the assured. Supposing this condition to have been expressed in so many words, on the back of the policy, would it not be very like a quibble to argue, that because, in terms "house or building" was only mentioned, that the contents of a house or building did not fall within these words. The risk, as to insurance on goods and chattels, is much greater than on "house or building," the number, quantity and value, being so variable and uncertain, and so difficult to be ascertained, of which this very case presents a

forcible example. Is it consistent with reason then, that the insurance on a chattel interest should be exempt from the obligations of an insurance on a house or building? The term "house or building" is a larger expression, comprehending within it the goods and chattels contained in it, and is not in my opinion exclusive of them. The rule *qui dicit de uno, negat de altero*, does not apply here, but the other and more certain rule *ubi eadem est ratio, ibi est idem jus*, is to receive its due application. The legislature, by the Act of the 19 Victoria, ch. 58, has placed this construction upon "house or building," as a generic term, comprehending different species, and not as distinct species, by declaring "that the provisions and sentiments contained in the 23d section of the above cited Act, (the section above cited) shall be held to *include* and *have* reference to *all property* as well personal as real." This legislative construction was proper, as the first Act undertook to make terms and conditions for the contracting parties, contrary to the usual course of legislation, it was right, to leave to implication as little as possible. I view the last act as only declaring what the common law would have ruled without it. In the construction of statutes, we find instances in Dwarris and Mailher de Chassat, of the application of the rule which in my opinion ought to decide this case, of bringing within a genus, cases of species not expressly enumerated. I have viewed this case as one of the construction of a contract, my opinion is the same if it be viewed in the light of the construction of a statute. I am, therefore, of opinion to affirm the judgment of the court below. (3 *J.*, p. 2.)

THOMAS W. RITCHIE, for Appellant.

SANBORN and BROOKS, for Respondents.

TESTAMENT.—LEGS.

COUR SUPÉRIEURE, Montréal, 20 mars 1857.

Coram SMITH, J., C. MONDELET, J., et BADGLEY, J.

ROBERT et al. *vs.* DORION et al.

Jugé: Qu'une disposition testamentaire conçue dans les termes suivants: "Je donne à mon frère la jouissance de tous les fonds que je possède, aussi bien que l'intérêt de tous les argents, avec les enfants qu'il a et qu'il aura de sa femme. Aussitôt que mon frère sera mort, ses enfants qui porteront le nom de Dorion retireront les profits et intérêts. Aussitôt que les filles seront mariées, ce sera fini pour elles, et les garçons retireront tous les revenus," constitue un legs universel. (1)

(1) Aart. art. 873 C. C.

Jacques Dorion est décédé le 20 janvier 1822, laissant les deux enfants, issus de son mariage avec Geneviève Decousse, Etienne et Marie-Hélène Dorion. Dans le terme de la Cour du Banc du Roi, tenue en avril 1822, Etienne et Marie-Hélène Dorion, ont porté une action en pétition d'hérédité contre Charles Dorion, leur oncle, et contre Horatio Gates et Nathaniel Jones, alléguant qu'ils étaient tous trois en possession des biens composant la succession de leur père. Charles Dorion a opposé à cette action que Jacques Dorion lui avait légué tous ses biens par un testament olographe, en date du 9 mars 1821. Les deux autres Défendeurs, Gates et Jones, ont allégué que Jacques Dorion, par son testament olographe du 9 mars 1821, le même que celui invoqué par Charles Dorion, lui avait légué tous ses biens et les avaient nommés ses exécuteurs testamentaires. Le 10 juin 1823, la Cour du Banc du Roi, par un jugement préléminaire, a ordonné aux Défendeurs Gates et Jones de rendre compte de ce qu'ils avaient en leur possession appartenant à la succession de Jacques Dorion. Le 7 octobre 1823, Gates et Jones ont rendu un compte, dans lequel ils ont porté la recette à £8,357 15s. 10d, la dépense à £210 14s. 8d. et la reprise à £7,851 12s. 6d, laissant une balance de £295 8s 8d qu'ils devaient à la succession, cette somme provenant de la vente des meubles et effets mobiliers de Jacques Dorion. Lors de l'audition sur le mérite de la cause, les Appelants ont prétendu que ce legs, ne pouvait s'étendre qu'à l'usufruit des sommes d'argent trouvées en la possession du testateur, lors de son décès, et à l'usufruit de ses immeubles, et non à ses meubles et à ses dettes actives qui constituaient la plus grande partie des biens de sa succession. La Cour du Banc du Roi, par son jugement du 20 avril 1824, a adjugé que Charles Dorion avait, en vertu de ce testament, droit de retenir, et de posséder *(to retain, hold and possess)* sous les restrictions y contenues, les immeubles de Jacques Dorion qui avait aussi disposé de l'intérêt de son argent en faveur de Charles Dorion et de ses enfants ; mais que, dans ce legs d'argent, devait être compris non seulement l'argent trouvé en la possession du testateur, lors de son décès mais encore toutes les sommes de deniers énumérées dans le jugement qui avaient été placées à intérêt, et dont il devait jouir sa vie durant, et, quant à tous les autres meubles, dettes et effets qui appartenaient au testateur, ou qui lui étaient dus lors de son décès, et dont Jacques Dorion n'avaient pas disposé par son testament, il a été adjugé qu'ils appartenaient de droit aux Demandeurs, Etienne Dorion et Marie-Hélène Dorion, et la cour ordonna aux Défendeurs de les leur rendre, et, adjugeant sur le compte rendu par les Défendeurs Gates et Jones, elle ordonna que la balance de £295 8s 8d qu'ils avaient entre leurs mains, en leur qualité d'exécuteurs testamentaires, serait

payée aux Demandeurs. Les Demandeurs s'étant pourvus contre cette décision, la Cour d'Appel par son jugement du 19 janvier 1828, l'a réformé, en adjugeant que, par son testament Jacques Dorion n'avait légué à son frère Charles Dorion, et à ses enfants conjointement avec lui, que l'*usufruit* de ses immeubles et l'intérêt des sommes qui lui étaient dues par obligation, la vie durant de Charles Dorion et de ses enfants, mâles et la vie durant de ses filles, ou jusqu'à ce qu'elles fussent mariées ; que les Demandeurs étaient propriétaires de la succession de Jacques Dorion, sous la réserve de l'usufruit et l'intérêt susmentionnés, en faveur de Charles et de ses enfants mâles et femelles conjointement, durant la vie de Charles Dorion, et la vie de ses enfants mâles, et celles de ses filles, ou jusqu'à ce que ces dernières fussent pourvues par mariage ; Charles Dorion, appela de ce jugement, et le 15 décembre 1830, Sa Majesté Guillaume IV, de l'avis de son conseil privé, infirma le jugement du 20 avril 1824, rendu par la ci-devant Cour du Banc du Roi, et celui du 19 janvier 1828, rendu par la Cour d'Appel, et ordonna que la procédure fut remise à la Cour du Banc du Roi ; et il fut déclaré, par ce décret, ou jugement, que les enfants de Charles Dorion, n'étant pas parties dans la cause, l'interprétation à donner au testament de Jacques Dorion, ne pouvait être prise en considération devant Sa Majesté, vu que l'intérêt de ses enfants dépendait en grande partie de cette interprétation. La procédure fut, en conséquence de ce jugement, remise à la ci-devant Cour du Banc du Roi, et les Demandeurs adoptèrent les procédés nécessaires pour mettre en cause les enfants de Charles Dorion, en formant contre eux une demande en déclaration de jugement commun. Pendant ces procédés, Etienne Dorion, l'un des Demandeurs, est décédé, et ses héritiers et représentants ont repris l'instance. Les trois Défendeurs sont également décédés, et leurs représentants ont été assignés à reprendre l'instance, et ont été condamnés à le faire.

La cause a été plaidée devant la Cour Supérieure, à Montréal, qui a rendu, le 20 mars 1857, le jugement suivant :

SMITH, J. : Charles Dorion also sets up the will, and pleads a bequest to himself and his children of the whole estate. The Plaintiffs answer generally that it is not true. Defendants say that they are the universal legatees, and are legally in possession and that no account is due. It is a question of title. It was contended that the legacy was of the usufruct only, and not *en propriété*. Defendants answer that it was a universal legacy, and that it made no difference, so far as this action was concerned, whether it was the usufruct only or *en propriété*. On examination of the will, we find that it embraces the entire succession, except the *meubles et effets*. The testator bequeaths

the *jouissance de ses fonds et les revenus de tous ses argents* to Charles Dorion and to his children bearing the name of Dorion. Was this a universal legacy? I think it was.

BADGLEY, J.: A uniformity of judicial opinion appears to prevail upon the validity of the will in question in this cause; both the provincial courts that originally adjudicated upon the contestation as well as the committee of the Privy Council in England have concurred upon this point. Assuming, then, the validity of the will, it sets out a bequest made by the testator to his brother Charles Dorion and to his children of the name of Dorion, and so long as they shall bear that name, of the *usufruit*, use and enjoyment *de tous les fonds et les revenus de tous ses argents*. Charles Dorion having died, *pendente lite*, his children have been made parties in the cause, in conformity with the suggestion to that effect contained in the judgment of the Privy Council, which suspend further proceedings for that purpose, *inasmuch as the children's interest materially depended upon the construction of the will.* Whatever doubt might be supposed to have existed in the mind of the judges of that court upon the important question of the construction of the will, a doubt strongly implied not only from their suggestion as above, but also from their reversal of the judgments of both the provincial courts original and appellate.

The definition of the universal legatee *en usufruit* is thus given by Prudhon: " L'usufruitier universel est celui à qui le testateur a légué la jouissance de tous ses biens: il est à titre universel seulement lorsque le testateur ne lui a légué que la jouissance d'une quote part de ses biens en général, ou celle de ses immeubles ou de son mobilier ou celle d'une quote-part de ses immeubles, ou de son mobilier généralement pris." Now, the bequest in this case is the *usufruit de tous les fonds et le revenu de tous ses argents*, terms comprehensive in themselves and characteristic of the *legs universel* not of the legs à *titre universel.*

Le jugement est comme suit: " The court considering that " Defendants *par reprise d'instance* have established the ma- " terial allegations set forth and contained in the exception " pleaded in this cause by Charles Dorion, Horatio Gates and " Nathaniel Jones, the three original Defendants and now repre- " sented by the Defendants *par reprise d'instance*, to the " action and *demande* of the Plaintiffs *par reprise d'instance*, " as representing the original Plaintiffs, Etienne Dorion and " Marie-Hélène Dorion, and particularly, that Jacques Dorion, " in and by his last will and testament olograph, made and " executed on the ninth day of March, did bequeath to Charles " Dorion and his children, his real and personal estate, under " the limitations therein contained, and that said bequest, by

" law, imparted a *legs universel* to and in favor of Charles " Dorion and his children; and, further, considering that, by " law, the effect of the said bequest (*legs universel*) under the " provisions of the said last will and testament, was to vest " in Charles Dorion and his children, by law, the estate so " bequeathed to them, by the said testator, so as to render any " *demande en délivranve de legs* by Charles Dorion and his " children altogether unnecessary; and, further, considering " that, at the time of the institution of the present action, " against Charles Dorion, and the other Defendants, Charles " Dorion was in possession of the real and personal estate so " bequeathed to him by Jacques Dorion, by virtue and under " the authority of the said last will and testament, and that " such possession was legal and valid to all intents and pur- " poses, and that, by reason thereof, and, by law, no action " accrued to and in favor of Plaintiffs to have and maintain " the conclusions by them taken in and by their declaration " against Charles Dorion; the court doth maintain the excep- " tion so by Defendants *par reprise d'instance* representing " Charles Dorion, one of the original Defendants, pleaded, in " and by the said peremptory exception, and doth dismiss this " action, as respects Defendants *par reprise d'instance* res- " pecting Charles Dorion, one of the principal Defendants; " and, further, considering that Defendants *par reprise d'ins-* " *tance* representing the original Defendants, Horatio Gates " and Nathaniel Jones, impleaded as Defendants in the present " action, in their capacity of executors of the last will and " testament of the said late Jacques Dorion have rendered to " Plaintiffs *par reprise d'instance* a just and faithful account, " as they were bound to do by law, of their gestion and admi- " nistration of the estate of Jacques Dorion, in their said qua- " lity of executors of that portion of the said estate and suc- " cession of the late Jacques Dorion, not comprehended and " included in the universal bequest by the testator to the said " Charles Dorion and his children; and, considering that by " the said account so rendered, Defendants *par reprise d'ins-* " *tance* representing Horatio Gates and Nathaniel Jones, it " appears that there is due and owing from the said estate " and succession of Jacques Dorion, by them as executors " thereof, as a balance or *reliquat de compte*, the sum of £295 " 8 8, to Plaintiffs *par reprise d'instance*, as the heirs-at-law " of Jacques Dorion: it is, therefore, adjudged that Defendants " *par reprise d'instance*, representing the original Defen- " dants, Horatio Gates and Nathaniel Jones, be and they are " hereby condemned to pay and satisfy to Plaintiffs *par* " *reprise d'instance* the sum of £295 8 8, balance or *reliquat* " *de compte* remaining in the hands of the executors, with

" interest thereon from this day. His Honor Mr. Justice Mon-
" delet, concurs in the conclusion of the judgment, dissenting,
" however, on that part of the judgment which qualifies as a
" *legs universel* a bequest which in the opinion of Judge
" Mondelet is a *legs* particulier. (3 *J.*, p. 12.)

CHERRIER, DORION et DORION, pour les Demandeurs.

LEBLANC et CASSIDY, pour les Défendeurs.

TESTAMENT.—LEGS.

COUR DU BANC DU ROI, Montréal, 20 avril 1824.

Présents : REID, J., FOUCHER, J., et PYKE, J.

ETIENNE DORION et al. *vs.* CHARLES DORION et al.

Jugé : Qu'une diposition testamentaire conçue dans les termes suivants : " Je donne à mon frère la jouissance de tous les fonds que je possède, aussi bien que l'intérêt de tous les argents, avec les enfants qu'il a et qu'il aura de sa femme ; aussitôt que mon frère sera mort, ses enfants qui porteront le nom de Dorion retireront les profits et intérêts ; aussitôt que les filles seront mariées, ce sera fini pour elles, et les garçons retireront tous les revenus " : comprend non seulement les argents en la possession du testateur, au jour de son décès, mais aussi les argents prêtés.

JUDGMENT : " It is considered, that by virtue of the said last will and testament, Defendant Charles Dorion is entitled to retain, hold and possess, under the limitations contained in the said last will and testament, all the real estate which belonged to Jacques Dorion, at the time of his decease, and that, in regard of the said real estate, no action hath accrued to Plaintiffs, nor is any account due to them touching the same. And in regard of the moveable property and effects of Jacques Dorion, it appears that, in the said last will and testament, Jacques Dorion, the testator, hath disposed only of his *money*, by giving and bequeathing the interest thereof to Charles Dorion and to the children of his marriage, with his last wife ; but that, by the expression contained in the last will and testament, it would appear to be the intention of the testator, to comprehend in this legacy, not only the money in his own possession at the time of his decease, but also the monies which he has, in his lifetime, placed out and secured at interest ; and therefore that, under this legacy, Charles Dorion is entitled to claim, have and receive the interest accrued and become due, and hereafter to accrue and become due, during his lifetime, on the sums of money, so placed out and secured upon interest by the testator, and in regard of which said sums of money therefore, no action hath accrued, nor is any account due to Plaintiffs.

"And, as to all the other moveable property, debts and effects, which belonged or were due and owing to the testator, at the time of his decease, and of which no disposition appears to have been made by the said last will and testament, it is adjudged that the same is and are the property and do, of right, belong to Plaintiffs, and it is thereupon ordered, that Defendants and each and every of them to deliver up to Plaintiffs, all and every the documents, papers and vouchers in the possession of Defendants or of any or either of them touching or regarding all or any of the said moveable property, debts and effects, hereby adjudged to Plaintiffs, and having seen and examined the account bearing date the sixth day of October, 1823, and filed in this court on the seventh day of the same month, made and rendered by Horatio Gates and Nathaniel Jones, the executors of the last will and testament, of the moveable property, monies, goods, chattels and effects of Jacques Dorion, which have come to their hands and possession since and during their administration under the said last will and testament, to which account no objections have been made or taken by any of the parties, it is, thereupon, adjudged, that the sum of £295 8 8, being the balance remaining in the hands of the executor, be by them paid over to Plaintiffs, first deducting therefrom what shall be reasonably taxed and allowed to the executors for their costs and expenses in and about the present."

Etienne Dorion *et al.* appelèrent de ce jugement et le 19 janvier 1828, la Cour d'Appel rendit le jugement suivant dans la cause de *Etienne Dorion et al.*, Appelants, vs. *Charles Dorion et al.*, Intimés.

THE COURT is of opinion that Jacques Dorion, deceased, by his last will and testament, bearing date the ninth day of March, 1821, did devise and bequeath to his brother, Charles Dorion, and to the children of Charles Dorion, by his last wife, jointly with the said Charles Dorion, the usufruct of all the real and immoveable estate, which was the property of him, Jacques Dorion, on the day of his decease, with the interest to accrue upon the several securities by mortgage for the payment of money of which Jacques Dorion, died possessed, to have, and to hold the usufruct of the said real and immoveable estate and the interest to accrue upon the said securities by mortgage, for the payment of money unto Charles Dorion, and to his said children male and female jointly, during the life of Charles Dorion, the lives of his said children being males and the lives of his said children being females, or until the day of the marriage of the said children being females respectively, as may first happen, and that no other right, title or benefit of any description whatsoever hath been, by the said last will and

testament of Jacques Dorion devised, or bequeathed to Charles Dorion or to the said children of Charles Dorion, male or female, or to any or either of them. It is, therefore, considered and adjudged that Etienne Dorion and Marie Hélène Dorion, Plaintiffs, are and they are hereby declared to be the true and lawful heirs of Jacques Dorion, deceased, and, as such the true and lawful proprietors of the succession of Jacques Dorion, deceased, and of all the estates, rights, debts, monies and effects moveable and immoveable, real and personal, which compose the said succession, and that thereof and of every part thereof Etienne Dorion and Marie Hélène Dorion, since the decease of Jacques Dorion, have been and now, by the law, are seized and thereunto are entitled *à titre de propriété*, subject to the usufruct and to the payment of the interest devised and bequeathed, as aforesaid, in the manner hereinafter adjudged and declared; and it is further considered and adjudged that the said last will and testament of Jacques Dorion, deceased, bearing date the ninth day of March, 1821, is, and it is hereby declared to be a lawful and efficient will, and that, under and by virtue thereof, Charles Dorion and his said children male and female are jointly entitled to the *usufruit* of all the real and immoveable estate which was the property of him, Jacques Dorion, on the day of his decease, and to the interest to accrue upon the several securities by mortgage for the payment of money of which he, Jacques Dorion, died possessed, from and after *délivrance de legs*, in each case respectively; and inasmuch as it appears, from the proceedings in this cause, that no *délivrance de legs* whatever hath, by Charles Dorion and his said children, been demanded or obtained of or from Plaintiffs; but that the defence of Defendant Charles Dorion, in this cause, is a claim of title on behalf of himself and of his said children to the usufruct and interest aforesaid under and by virtue of the said last will and testament of Jacques Dorion, deceased. It is further considered and adjudged that this present judgment do and shall stand as a judgment *en délivrance de legs*, and that under and by virtue thereof, Charles Dorion and his children, from and after this day and during the life of Charles Dorion, the lives of his children being males and the lives of his children being females or until the day of the marriage of the said children, being males as may first happen, shall be entitled to possess, have and hold *en usufruit* all the real and immoveable estate which was the property of Jacques Dorion, on the day of his decease and to receive the rents, issues and profits thereof, which from and after this day shall accrue thereon, at the interest which from and after this day shall in like manner accrue upon the several securities by mortgage for

the payment of money of which Jacques Dorion died possessed ; and, inasmuch as Plaintiffs have been by law seized of the estate and succession of Jacques Dorion from the day of his decease until *délivrance de legs*, was by this judgment so as aforesaid made and awarded, and in contemplation of law, were, therefore, possessors thereof *de bonne foi ;* it is further considered and adjudged that Etienne Dorion and Marie Hélène Dorion are, and they are hereby declared to be entitled to all the rents, issues and profits, which have accrued upon all, and any and every part of the real and immoveable estate which was the property of Jacques Dorion, on the day of his decease, from the day of the decease of Jacques Dorion until this day and to all the interest which in like manner hath accrued and become due upon the several securities by mortgage for the payment of money of which Jacques Dorion died possessed, from the day of the decease of Jacques Dorion until this day. And by reason of the premises, it is further considered and adjudged that Charles Dorion, in the space of three calendar months next after signification of this judgment, do render to Etienne Dorion and Marie Hélène Dorion, a just and true account in due form of law, of all and every the estates, real and immoveable, which were the property of Jacques Dorion, on the day of his decease, and since his decease have been in the actual possession of Charles Dorion and of the rents, issues and profits of such estates and of each and every of them, from the day of the decease of Charles Dorion until this day ; that Charles Dorion, Horatio Gates and Nathaniel Jones and each of them in like manner in the space of three months next after signification of this judgment do render to Etienne Dorion and Marie Hélène Dorion a just and true account in due form of law of all and every the estate moveable, rights, debts, monies, securities for money books of account, titles, deeds, papers and other effects moveable of every description of which Jacques Dorion died possessed, and which since the decease of the said Jacques Dorion, have come to the hands, possession or power of Charles Dorion, Horatio Gates and Nathaniel Jones, or of either of them respectively, and more particularly do render a just and true account, in due form of law, of all the interest which hath accrued and become due upon the several securities by mortgage for the payment of money of which the said Jacques Dorion died possessed from the day of the decease of the said Jacques Dorion until this day, and which since the decease of the said Jacques Dorion has come to the hands, possession or power of the said Charles Dorion, Horatio Gates and Nathaniel Jones, or of either of them, respectively ; and lastly it is considered and adjudged that the judgment of the court below

of the twentieth day of April, 1824, in so far as the same doth in any respect militate against this judgment or against any matter or thing therein contained, be and the same is hereby set aside and reversed. (3 *J.*, p. 22.)

PROCEDURE.—PARTIES EN CAUSE.

CONSEIL PRIVÉ DE SA MAJESTÉ, 15 décembre 1830.

CHARLES DORION, Appelant, *et* ETIENNE DORION et al., Intimés.

Jugé: Que dans une poursuite où il s'agit de l'interprétation d'un testament, toutes les parties qui peuvent être affectées par cette interprétation doivent être mises en cause pour jugement commun.

Les faits de cette cause apparaissent dans les rapports des causes ci-dessus p. 336 et 341.

JUGEMENT : His late Majesty having been pleased by his order in council, of the 15th of January, 1829, to refer into the Committee the petition and appeal of Charles Dorion, against Etienne Dorion and Marie Hélène Dorion, setting forth that, &c.... The Lords of the Committee, this day, took the petition and appeal into consideration, and Their Lordships do agree humbly to report, as their opinion, to your Majesty, that the judgment of the Court of King's Bench, at Montreal, of the 20th April, 1824, and also the judgment of the Court of Appeals of the Province of Lower Canada, of the 19th of January, 1828, should be reversed, and that the case should be remitted to the said Court of King's Bench, with a declaration that, the children of Appellant Charles Dorion not being parties in the suit, the consideration of the construction of the will of the testator Jacques Dorion cannot be proceeded in before Your Majesty in council, inasmuch as the interest of the children of Charles Dorion materially depends upon that construction. His Majesty having taken said report into consideration was pleased, by and with the advice of his privy council, to approve thereof, and to order, as it is hereby ordered, that the judgment of the Court of King's Bench, at Montreal, of the 20th of April, 1824, and also the judgment of the Court of Appeals of the Province of Lower Canada, of the nineteenth of January, 1828, be and the same are hereby reversed, and that the case be and the same is hereby remitted to the said Court of King's Bench ; and it is hereby declared that the children of Charles Dorion, not being parties in the suit, the consideration of the construction of the will of the testator Jacques Dorion, cannot be proceeded in before His Majesty in council, inasmuch as the interest of the children of the said Charles Dorion materially depends upon that construction. (3 *J.*, p. 25.)

ASSIGNATION.—COMPETENCE.

COUR SUPÉRIEURE, Montréal, 29 mai 1858.

Coram SMITH, J.

MONTY *vs.* RUITER.

Jugé : Que le *writ* étant le commencement de l'action, la cour a juridiction du jour de son émanation, quoique signifié à une personne qui a cessé d'être justiciable de cette cour depuis son émanation, par l'érection d'un nouveau district. (1)

Le *writ* d'assignation qui avait été émané le 25 février 1858, avait été signifié le 6 mars 1858, au domicile du Défendeur, dans le township de Dunham, dans le nouveau district de Bedford, par un huissier de la paroisse de Ste-Marie de Monnoir, ci-devant enclavée dans le district de Montréal, et maintenant dans le district d'Iberville. Le Défendeur produisit une exception déclinatoire, par laquelle il prétendait que la cour n'avait aucune juridiction, ni sur la matière en litige ni sur le Défendeur qui ne lui était pas justiciable. L'Acte de judicature de 1857 est devenu en force le 6 mars 1858, en sorte que le district de Bedford a, dès lors, été érigé pour les fins civiles par l'opération de cette loi.

SMITH, J. : By the 146th section of the 20th Vic., ch. 44, it is stated that " no alterations in the limits of any district or " circuit, &c., shall affect any suit or proceeding pending when " such alteration shall take place," &c. Was this suit pending from the day on which the writ issued in this cause ? From the language of the 12th Vic., chap. 38, sec. 19, the issuing of the writ must be taken as the commencement of the action, so that, in this instance, the writ having been issued before the proclamation for the new districts, this suit fell within the provisions of the 146th section of the Judicature Act of 1857, wherein it is stated that certain actions shall not be affected by the alterations of the new districts. The writ had therefore the power to summon Defendant, but the bailiff had no right to serve the writ. In this view of the case, Defendant should have met the action by an *exception à la forme. Exception déclinatoire* dismissed. (3 *J.*, p. 26.)

LAFLAMME, LAFLAMME and BARNARD, for Plaintiff.

DOHERTY, for Defendant.

(1) V. art. 34 C. P. C.

PROCEDURE.—DISTRIBUTION DE DENIERS.

COUR SUPÉRIEURE, Montréal, 25 septembre 1858.

Coram BADGLEY, J.

WOODMAN *vs.* LÉTOURNEAU, *and* ED. LÉTOURNEAU, Opposant.

Jugé : Que, sur permission de la cour, et en connaissance de cause, une opposition à fin de conserver peut être produite, en aucun temps avant l'homologation du rapport de collocation, en par l'Opposant payant tels frais qui peuvent être encourus sur la réformation de ce rapport, et de plus 20s. de dépens.

Le rapport de distribution des deniers provenant de la vente des biens immeubles du Défendeur ayant été produit et affiché le 13 septembre 1858, Edouard Létourneau fit motion pour permission de produire son opposition à fin de conserver. Cette motion était appuyée d'affidavits de la part de l'Opposant et de son procureur et fut opposée par le Demandeur.

PER CURIAM : L'opposition est reçue, à la condition que l'Opposant paiera les frais à être encourus sur la réformation du rapport de collocation et de plus 20s. (3 *J.*, p. 27.)

LANCTOT, pour le Demandeur.

CHERRIER, DORION et DORION, pour l'Opposant.

Vide même décision, par le juge C. Mondelet, en la cause, No 2570, Hubert *vs.* Lemieux, et divers Opposants, *et* Rapin, Opposant, permettant à ce dernier de produire son opposition à fin de conserver, en par lui procédant *à ses propres dépens*, le 28 octobre 1858.

RATIFICATION DE TITRE.

COUR SUPÉRIEURE, Montréal, 4 mai 1852.

Coram DAY, J., SMITH, J., MONDELET, J.

Ex parte GEORGE HART, Requérant sentence de ratification de titre, *et* DIVERS OPPOSANTS.

Jugé : Que l'acquéreur n'est point tenu de déposer l'intérêt du prix de son acquisition pour obtenir une sentence ou jugement de ratification et la purge des hypothèques affectant sa propriété. (1)

George Hart, dont la requête fut produite le 1er octobre 1849, ayant acquis, le 4 août 1847, la propriété dont il demandait ratification de titre, pour la somme de £100, payable avec intérêt, fit motion, le 21 octobre 1851, pour qu'il lui fût donné acte du dépôt qu'il faisait alors de la somme de £100, avec intérêt. Nonobstant cette motion, George Hart ne déposa que

(1) V. art. 963 C. P. C.

la somme de £100 sans intérêt. Le 12 avril 1852, François Perrin, un des Opposants, fit motion, "qu'attendu que le Re-"quérant n'a réellement déposé que la somme de cent louis, mon-"tant de son prix d'acquisition, en principal, sans déposer "l'intérêt, depuis le jour de son acquisition à venir au jour "de son dépôt, savoir, depuis le 4 août 1847, au 21 octobre "dernier, lequel intérêt se monte à la somme de £25 5s. 8d., "quoique, par la loi, il était tenu de ce faire, et que, par sa "motion faite le vingt et un octobre dernier, il a demandé acte "du dépôt de la somme de £100 avec intérêt, comme s'il eût "déposé l'intérêt et, partant, il n'a pas déposé tout son dit "prix d'acquisition ; le prétendu dépôt soit déclaré nul." Cette motion fut renvoyée, sur le principe qu'un acquéreur n'est pas obligé par le statut provincial, 9 Geo., IV, ch. 20, de déposer l'intérêt de son prix d'acquisition.

JUGEMENT : "The court *considering that the interest on the "said sum of £100 is no part of the price of the said land,* "doth dismiss the said motion." (3 *J.*, p. 40.)

A. et G. ROBERTSON, pour Geo. Hart.

P. R. LAFRENAYE, pour François Perrin.

LOUAGE.—RESILIATION DE BAIL.

COUR SUPÉRIEURE, Montréal, 2 octobre 1858.

(EN VACANCE.)

Coram C. MONDELET, J.

MACDONELL et al. *vs.* Collins.

Jugé : Qu'un locataire qui ne doit qu'un seul terme de loyer peut être expulsé en vertu de la 18 Vic., ch. 108 sec., 2 par. 4. (1)

Le Défendeur ayant été poursuivi, en vertu de l'acte des locateurs et locataires, pour quitter les lieux loués, sur l'allégué qu'il était dû aux Demandeurs £52 10s. montant du quartier de loyer échu le 1er août 1857, en vertu d'un bail notarié reçu devant Mtre Isaacson, le 17 janvier 1857, et n'ayant pas contesté, la cause fut inscrite au mérite *ex parte.* La seule question qui fut soumise à la considération de la cour était de savoir : si un locataire pouvait être expulsé faute de paiement du loyer pour moins de trois termes. Le jugement fut rendu en faveur des Demandeurs. (3 *J.*, p. 41.)

A. et G. ROBERTSON, pour les Demandeurs.

LAFRENAYE et PAPIN, pour le Défendeur.

(1) V. art. 1624 et 1625 C. C.

LOUAGE.—TRANSPORT.—EXPULSION.

COUR SUPÉRIEURE, Montréal, 29 mai 1858.

Coram C. MONDELET, J.

LACROIX *vs.* PRIEUR.

Jugé: 1° Que l'acquéreur d'une maison vendue par décret a un droit d'action contre l'occupant pour loyer par suite de son occupation de cette maison lors et depuis le décret. (1)

2° Que l'occupant qui a enlevé les meubles garnissant la maison pour les transporter ailleurs et qui a dégarni les lieux, doit être condamné au paiement du loyer de l'année entière. (2)

Le Demandeur a poursuivi le Défendeur, le 2 septembre 1857, pour la somme de £32 9s. 6d., savoir: £30 pour le loyer de l'année, devant expirer le 1er mai 1858, et £2 9s. 6d., pour les cotisations imposées sur cette propriété par la corporation de Montréal, pour l'année alors courante. Le Demandeur alléguait que le Défendeur a occupé, depuis le 1er mai dernier, au douze du même mois à titre de locataire, et avec la permission de Amélia Hopper, veuve Stevens, de cette cité, une maison en briques, à deux étages, à raison de £36 par année de loyer, payable chaque mois, et les cotisations; que la valeur annuelle de la maison et dépendances, occupées par le Défendeur était et est d'au moins la dite somme de £36 par année, et les cotisations imposées sur icelles par la corporation de Montréal, pour l'année courante, lesquelles cotisations se montent à £2 9s. 6d.; que, le douze mai dernier, le Demandeur a acquis la dite maison du shérif du district de Montréal, à une vente qu'en a faite ce dernier, en vertu d'un bref de *venditioni exponas*, émané de cette cour, contre Amélia Hopper, à la poursuite de "Trust and Loan Company of Upper Canada"; que le Demandeur est, en conséquence, de la dite acquisition, subrogé en tous les droits de propriété de dame Stevens sur la dite maison, et les loyers d'icelle à compter du 12 mai dernier; que le Défendeur a continué d'occuper la maison avec la permission du Demandeur, et n'a payé aucune partie du loyer d'icelle au Demandeur, et que, le ou vers le 27 août dernier, et depuis, le Défendeur a enlevé tous les meubles et effets qui servaient à garnir la maison, pour sûreté du loyer d'icelle, et les a transportés dans une autre maison; Le Demandeur concluait à l'émanation d'un writ de saisie-gagerie par droit de suite, et au paiement de la somme de £32 9s. 6d. Le Défendeur a plaidé comme suit: que, le 5 mai 1857, la dame Hopper déclara au Défendeur qu'elle allait

(1) V. art. 1570 et 1571 C. C.

(2) V. art. 1624 C. C.

mettre fin à la saisie de la maison, en payant le montant de la créance pour laquelle la saisie-arrêt avait été faite, ou que, du moins, elle trouverait moyen de faire acheter cette maison pour elle par l'entremise de quelqu'ami, et, là et alors, la dame Hopper loua au Défendeur, la maison en question, pour l'espace de temps qui devait s'écouler de ce jour-là au jour de la vente de telle maison, sur le pied de £3 par mois, sans autre charge, et il fut convenu entre la dame Hopper et le Défendeur, que, si elle (la dame Hopper) devenait acquéreure de telle maison au décret, qu'alors et dans tel cas, le Défendeur pourrait continuer à l'occuper à raison de £3 par mois, mais que, si elle ne devenait point acquéreure, que lui (Défendeur) aurait à faire ses conditions avec l'acquéreur, et il fut convenu que si la dame Hopper devenait acquéreure à décret, elle n'aurait au reste droit à £3 par mois qu'en contruisant en arrière de la maison une cuisine pour l'usage du Défendeur, et que, sans cela, le Défendeur pourrait quitter les lieux ; que le Défendeur a pris possession de la maison le 5 mai 1857, et l'a occupée jusqu'au 12 du même mois, époque à laquelle le Demandeur en est devenu propriétaire ; qu'aussitôt après le Demandeur fut ainsi devenu propriétaire, le Défendeur s'est adressé à lui pour obtenir un bail des lieux, mais le Demandeur a refusé, en disant qu'il pensait ne point rester propriétaire ; que le Défendeur a occupé la maison jusque vers le 27 août 1857, et qu'en la quittant, le ou vers le 30 août 1857, et avant l'institution de la présente action, il a offert au Demandeur, en espèces légales et à deniers découverts, en la cité de Montréal, en présence de témoins, une somme de onze livres, pour trois mois et vingt jours de jouissance et occupation de la maison, savoir : pour jouissance depuis le 12 mai 1857, inclusivement au 1er septembre de la même année, mais que le Demandeur a refusé d'accepter telles offres, en disant qu'il avait droit à une année de loyer ; que la valeur de la jouissance et occupation de la maison n'a été, aux dites époques, tout au plus que de £3 par mois, et que même cette somme était trop élevée, vu que cette maison était pour ainsi dire inhabitable, à raison de sa mauvaise construction, et de la quantité d'eau qui s'accumulait constamment dans sa cave ; que le Défendeur n'a point loué la maison pour une année, ni de Amélia Hopper ni d'aucun autre ; que de l'exposé ci-haut il résulte en loi que lui (Défendeur) ne peut être sujet au paiement d'une année de loyer de la maison, mais que le seul montant qu'il soit obligé de payer est celui de la jouissance et occupation de la maison pendant l'époque susdite ; en conséquence, le Défendeur conclut à ce que ses offres soient déclarées bonnes et valables pour le montant desquelles il était prêt à confesser jugement en faveur du Demandeur. La Cour a maintenu le droit d'action

du Demandeur, et lui a donné jugement pour le montant entier du loyer pour l'année expirant le 1er mai 1858. Son action avait été émanée le 2 septembre 1857.

JUGEMENT : Considérant que le Demandeur a fait preuve des allégués essentiels de sa déclaration, et, nommément, que le Défendeur a occupé, suivant et comme il l'allègue, l'héritage décrit en sa déclaration ; considérant, de plus, que le Demandeur est en droit de réclamer du Défendeur *le loyer du dit héritage pour l'année entière* ; attendu que le Défendeur a dégarni les lieux, et a transporté les meubles et effets mobiliers qui garnissaient la maison par lui occupée, en une autre maison, condamne le Défendeur à payer au Demandeur la somme de £30, pour le loyer de l'année expirée le 1er mai 1858. (3 *J.*, p. 42.)

CHERRIER, DORION et DORION, pour le Demandeur.

LEBLANC et CASSIDY, pour le Défendeur.

LOUAGE.—EXPULSION.

COUR SUPÉRIEURE, Montréal, 7 décembre 1858.

(EN VACANCE.)

Coram BADGLEY, J.

HEALY *vs.* LABELLE.

Jugé : Qu'un locataire ne peut pas être expulsé en vertu de la 18 Vic, ch. 108, sec. 2, par. 4, sur le principe qu'il ne paie pas son loyer conformément aux conditions du bail. (1)

Le Défendeur à la demande en expulsion dirigée contre, lui sur le principe qu'il devait à la Demanderesse la somme de £15 8s. 4d. étant la balance de son loyer échu depuis le 1er mai 1858 au 1er août 1858, à raison de £4 3s. 4d. par mois en vertu d'un bail notarié, opposa " that the action of Plaintiff, as instituted, cannot be maintained, and that Defendant cannot be compelled to answer, because he, Defendant, says that the action and demand of Plaintiff is in fact a demand or action to recover the rent by her alleged to be due by Defendant ; and is not as is required by law, a demand or action for the rescision of the lease, or the recovery of the possession of the leased premises, in any of the cases provided for by law, as in a demand for rent joined to either of the aforesaid remedies ; and the demand and action, as brought, is *primarily* for the recovery of rent, which said action and demand cannot by law, be brought or entertained." La De-

(1) V. la cause de *Macdonell* vs. *Collins*, ci-dessus, p. 348, art. et 1624 et 1625 C. C.

manderesse ayant répondu en droit à cette exception, la cour renvoya la réponse en droit sur le principe que les allégués de sa déclaration n'étaient pas suffisants pour lui donner le droit d'expulser son locataire, mais elle lui permit d'amender sa déclaration, en y ajoutant comme cause de la rescision du bail, que le Défendeur ne garnissait pas les lieux loués suffisamment pour en assurer le loyer. Cet amendement ayant été fait le 15 novembre 1858, le Défendeur plaida encore la même exception, qui fut renvoyée sur une autre réponse en droit de la Demanderesse. Le jugement qui renvoie cette exception est comme suit : " The court considering that Plaintiff's amended decla- " ration discloses on its face a sufficient ground for proceeding " in ejectment against Defendant doth dismiss Defendant's " exception." (3 *J.*, p. 45.)

DOHERTY, pour la Demanderesse.

DEBLEURY et BOURGEAU, pour le Défendeur.

PROCES PAR JURY.—DEPENS.

COUR SUPÉRIEURE, Montréal, 28 novembre 1857.

Coram SMITH, J.

BEAUDRY *vs.* PAPIN, *and* PAPIN, Opposant.

Jugé : 1° Que les frais encourus sur le verdict d'un jury qui a été mis de côté, ne sont pas à la charge de la partie qui a obtenu ce verdict en sa faveur.

2° Que dans un tel cas, la partie contre laquelle le verdict a été rendu, est généralement condamnée aux frais du premier procès. (1)

Le 29 juillet 1857, un bref de saisie-exécution fut émané de la Cour Supérieure siégeant à Montréal, contre les biens meubles du Défendeur pour £99 1s. 2d. que les avocats du Demandeur réclamaient par distraction de frais, en vertu d'un jugement rendu par la Cour du Banc de la Reine, le 12 mars 1857, renversant le jugement de la Cour Supérieure, mettant de côté le verdict du jury, ordonnant un nouveau procès, condamnant le Défendeur aux frais de l'appel, et ordonnant de plus, qu'il paierait les frais en Cour Supérieure, sans mentinner quels frais. L'action du Demandeur était pour dommages personnels, et le jury, rendit un verdict contre lui. Le Demandeur ayant fait motion pour obtenir un nouveau procès, prétendant que le verdict était contraire à la preuve, la Cour Supérieure rejeta sa motion, et, conformément au verdict, débouta le Demandeur de son action. En appel, ce

(1) V. art. 478 C. P. C.

jugement fut cassé. (1) Cette motion pour un nouveau procès ne réclame aucun dépens. La principale question était une question d'interprétation du jugement de la Cour du Banc de la Reine, quant aux *frais en Cour Supérieure*, que le Défendeur avait été condamné à payer. Le 28 juillet 1857, le Défendeur fit offre par acte notarié de la somme de £51 8s. 10d., montant des frais de l'appel, et de plus 13s. 8d. étant les frais sur la motion. Ces offres furent refusées, et le Demandeur ayant fait taxer ses frais, fit émaner une saisie-exécution. Le Défendeur forma une opposition à fin d'annuler, et déposa le montant de ses offres. Cette opposition ayant été maintenue, ces offres furent déclarées suffisantes et la saisie fut déclarée nulle.

SMITH, J.: The question raised by the opposition rests on the interpretation to be given to that part of the judgment rendered in appeal, concerning costs: a tender of £52 2s 6d, has been made by Opposant, being the amount of the costs in appeal and costs of motion. This tender accompanies the opposition. In looking at the judgment of the Court of Appeals, there is to be found no distraction to cover the costs below. Then, as to the true meaning of the words contained in the judgment rendered in appeal, it is necessary to enquire. That judgment is rendered in appeal concerning two judgments rendered in the court below. Now what are the costs stated in the judgment rendered in appeal, as to costs. Upon what principle would the court above intend to give costs anterior to the new trial? Upon the motion for a new trial that court could only give such costs as the court below would have given anterior to the period mentioned in appeal. Supposing that a new trial had been ordered by the Superior Court reversing the verdict of the jury, what would have been the costs then? Upon the law of new trials, scarcely a case is to be found where, upon a mere error of the jury, the costs of the first trial are to be borne by the successful party. In no part of the world where trials by jury are understood, have the costs of the first trial be thrown upon the successful party. In England, in such a case as this one, the Plaintiff would have paid the costs upon the granting of a new trial. Several cases, in England and the United States, reported in the Books, show that, where this is error, as mentioned in the *considérants* of the judgment rendered in appeal; wherein it is stated that the jury has not properly weighed the evidence, Plaintiff pays the costs. I would not have granted a new trial without Plaintiff paying the costs. I may mention here that the original motion did not

(1) 2 R. J. R. Q., p. 425.

ask for costs at all. The tender is declared good and valid, and the opposition is therefore maintained with costs.

Jugement : " The court, having heard Plaintiff, " par distraction de frais," and Opposant, upon the merits of the contestation by Plaintiff " par distraction de frais " of the opposition of Opposant ; considering that Opposant hath fully established the material allegations of his opposition, and that Plaintiff " par distraction " has no right to take, in execution, the goods and chattels of Opposant for any larger or greater sum than the costs awarded in and by the judgment rendered in the Court of Queen's Bench, appeal side, and considering that by the judgment the costs awarded to Plaintiff " par distraction " were such costs only as were incurred subsequently to the motion for a new trial, which said motion had been refused by the court below ; and considering that the judgment in appeal reverses the judgment in the court below, without any mention whatever of costs as regards the said motion, and considering that the proceedings in the court below are only, by the said judgment, reversed from the time of the rendering of the judgment by the court below on the said motion for a new trial ; and, further, considering that, by the said motion in the court below, no costs whatever are asked or demanded by Plaintiff in the court below ; the court doth reject the contestation of Plaintiff " par distraction," and doth declare the offer made by Opposant before the issuing of the writ of execution *de bonis*, and, subsequently, reiterated in and by the opposition to be good and valid ; and doth maintain the opposition and doth condemn Plaintiff, " par distraction " to pay the costs of the opposition." (3 *J.*, p. 46.)

OUIMET, MORIN and MARCHAND, for Plaintiff.

LAFRENAYE, for Defendant and Opposant.

REPRISE D'INSTANCE.

COUR SUPÉRIEURE, Montréal, 29 mai 1858.

Coram DAY, J.

FARIBEAULT *vs.* ST-LOUIS et al., *et* LA COMPAGNIE DU RICHELIEU, Demanderesse par reprise d'instance.

Jugé : Qu'une association qui durant le procès a été incorporée par acte provincial, est bien fondée à reprendre l'instance comme corps incorporé. (1)

Une compagnie non incorporée, composée de plusieurs actionnaires, et possédant des bateaux à vapeur, avait actionné

(1) V. art 438 C. . C.

les Défendeurs, pour la somme de £48 6 6. Depuis l'institution de l'action, cette compagnie étant devenue incorporée, par l'acte 20 Vic., ch. 170, elle présenta une requête pour reprendre l'instance, sous le nom de son incorporation.

DAY, J. : This is an application by the Richelieu Company to take up the *instance*, as Plaintiff in this case. The original Plaintiffs, forming a joint stock company, have since the commencement of this suit, been incorporated by act of Parliament, and they now pray that the new Company should be allowed to take the place of Plaintiffs. Defendants have objected, but it is a right which clearly belongs to the petitioners. By their act of incorporation, it is declared that all the property, rights and actions belonging to the said joint stock company shall be transferred to the Richelieu Company, and that all debts and obligations should be acquitted and performed by the said corporation. The petition is therefore granted. (3 *J.*, p. 51.)

LAFRENAYE and PAPIN, for Plaintiffs.

CARTIER and BERTHELOT, for Defendant.

CUMUL D'ACTIONS.—PREUVE.

COUR SUPÉRIEURE, Montréal, 30 juin 1858.

Coram SMITH, J.

TRUDEAU et al. *vs.* MÉNARD.

Jugé : 1° Que deux créanciers peuvent poursuivre ensemble pour le recouvrement de leur créance résultant d'un même contrat. (1)

2° Qu'un contrat entre un commerçant et un qui ne l'est pas pour une valeur excédant $50 ne peut pas être prouvé par témoins, sans un commencement de preuve par écrit. (2)

Cette action était intentée par deux commerçants non associés pour l'inexécution d'une convention verbale intervenue le 1er juin 1854, entre eux d'une part, et le Défendeur et un nommé Pierre Dugrenier d'autre part, et par laquelle ces derniers se seraient engagés et obligés, conjointement et solidairement, de faire et fournir aux Demandeurs dans le cours de l'hiver suivant, la quantité de deux cents cordes de bois de de corde d'épinette, à raison de 5s. 10d. par corde, que les Demandeurs devaient leur payer, le bois livrable sur la ligne du Grand-Tronc, au neuvième rang de la paroisse Saint-Simon. Par

(1) Vide also 6 *R. J. R. Q.*, p. 206, *Stevenson et al.* vs. *Bisset*, et art. 15 C. P. C.

(2) V. art 1233 et 1235 C. C.

acte reçu à Saint-Pie, devant Bachand et confrère, notaires, le 9 mai 1855, le Défendeur reconnut avoir reçu, en diverses fois, avant cette époque, des Demandeurs, diverses sommes de deniers au montant de trente-sept livres, dix schellings sur et à compte de ce contrat de bois consenti par le Défendeur et Pierre Dugrenier envers les Demandeurs, et, attendu que Ménard et Dugrenier n'avaient pas rempli leur contrat, mais qu'ils devaient, par après, le remplir suivant et conformément aux conventions intervenues entre eux. Le Défendeur et Dugrenier ayant négligé d'accomplir les engagements qu'ils avaient ainsi contractés avec les Demandeurs, ceux-ci, dans le cours du mois de décembre 1856, auraient consenti par convention verbale, d'accorder au Défendeur le cours de l'hiver 1856-57, pour faire fournir et livrer aux Demandeurs la dite quantité de deux cents cordes de bois qu'il promit fournir *en bois franc*, à l'exception de dix cordes qui devaient être de bois d'épinette. Le Défendeur ayant encore négligé de fournir et livrer aux Demandeurs qui l'en avaient souvent requis, la dite quantité de bois, et ayant totalement failli à ses obligations résultant des dites conventions, les Demandeurs réclamaient £50 de dommages, en sus des avances par eux faites, en tout la somme de £87 10s., savoir : £50 de dommages, et celle de £37 10s., par eux avancée au Défendeur. Le Défendeur plaida qu'il avait exécuté cette convention. Le 27 mai 1858, le juge Mondelet ordonna une nouvelle audition sur la question de savoir si les Demandeurs avaient le droit de se joindre pour porter une seule action. La cause ayant été inscrite de nouveau pour audition au mérite en juin 1858, jugement fut rendu en faveur des Demandeurs pour £36 4s., y compris £10 de dommages, vu que la preuve faite par les Demandeurs par témoins ne pouvait pas être reçue sans un commencement de preuve par écrit, avec intérêt sur la somme avancée, du jour de sa réception par le Défendeur (3 *J.*, p. 52.)

CHERRIER, DORION et DORION, pour les Demandeurs.

SICOTTE et CHAGNON, pour le Défendeur.

ASSIGNATION.

COUR SUPÉRIEURE, Montréal, 17 mai 1859.

Coram DAY, J.

TAYLOR *vs.* SÉNÉCAL et al.

Jugé : Qu'il est nécessaire qu'un writ d'assignation accompagne la déclaration, nonobstant la comparution du Défendeur par procureur. (1)

Cette action était portée pour le recouvrement d'un billet promissoire signé par les Défendeurs comme associés, qu'ils contestèrent par une exception de compensation. La cause ayant été inscrite au mérite, la cour était sur le point de rendre jugement en faveur du Demandeur, lorsqu'elle s'aperçut qu'il n'y avait aucun bref de sommation.

PER CURIAM : Le Défendeur peut bien comparaître par son avocat sans avoir été assigné. Il n'est pas nécessaire que le writ lui soit signifié pour autoriser son procureur à comparaître devant la cour, lorsqu'il ne désire pas se prévaloir de ce défaut. Mais il faut absolument qu'un writ soit émané de la cour, pour lui donner juridiction. Dans l'espèce, le writ d'assignation n'étant pas produit, la cause est renvoyée du délibéré. (3 *J.*, p. 53.)

A. et G. ROBERTSON, pour le Demandeur.

ARCHAMBAULT et DUHAMEL, pour les Défendeurs.

OPPOSITION A FIN D'ANNULER.

SUPERIOR COURT, Montreal, 30th December, 1858.

Coram BADGLEY, J.

WALKER *vs.* BURROUGHS *and* BURROUGHS, Opposant.

Held : That opposition *à fin d'annuler*, dated after the making of the affidavit appended thereto, must be set aside. (2)

On the 26th November, 1858, Opposant fyled an opposition *à fin d'annuler* to an *alias* writ of execution against his lands. The affidavit followed the opposition, and was written upon the same page. The affidavit was made at St. Andrews, on the 24th November, while the opposition bore date, at Montreal, the 26th of said month, apparently two days after the making of the affidavit. Plaintiff moved to set aside the opposition, on the ground that the affidavit did not apply to

(1) V. art. 43 C. P. C.

(2) V. art. 583 et 651 C. P. C.

the opposition. At the argument, the counsel for Opposant contended that the discrepancy in the date of the opposition was not fatal; that it was evidently an error; that, in fact, the date of the opposition was without the affidavit only authenticated by the fyling of the opposition, and that, so far as concerned its merits, the date was immaterial. In support of this view of the immateriality of the date, counsel cited the case in the Superior Court, No. 1707, *Wilson* vs. *Pariseau*, and *Dalpé dit Parizeau*, Opposant, in which there had been a similar motion made to set aside the opposition, on the ground of the insufficiency of the affidavit. In the latter case, the opposition was dated 7th September, 1857, the affidavit the 28th of same month, while the writ of execution was issued and the seizure made on the 16th of same month; the opposition being, in fact, dated nine days before the issuing of the writ of execution. The court composed of Justices Smith, Mondelet and Badgley, by judgment 18th November of same year, dismissed the motion. Another motion was made in the same case to set aside an opposition fyled by dame Simard, which was also rejected, 20th December, 1856, by Justices Day, Smith and Mondelet. In the latter case, the opposition was dated the day before the affidavit was made.

BADGLEY, J., dismissed the opposition, holding the irregularity in the date to be fatal, and that the cases sent up were inapplicable. (3 *J.*, p. 53.)

ABBOTT and BAKER, for Plaintiff.

CROSS and BANCROFT, for Opposant.

SUBSTITUTION.—CURATEUR.

SUPERIOR COURT, Montreal, 30th May, 1857,

Coram DAY, J., SMITH, J., C. MONDELET, J.

GAUTHIER *vs.* BOUDREAU et al.

Held: That an action does not lie in favour of a tutor, elected *en justice* to a substitution under a will, to have the enjoyment of the usufructuary declared forfeited, *en déchéance d'usufruit.* (1)

The declaration of Plaintiff set up the will of Joseph Simard, whereby the usufruct of certain immoveable property was given to Defendants, that, after the expiration of the usufruct, the property was to go to the children of Defendants; that the Defendants entering into the enjoyment of the property, under the will, did not use it *en bon père de famille*, but wasted it, whereby their rights, as usufructuaries, were

(1) V. art. 945 C. C.

forfeited; that Plaintiff, on the 6th January, 1855, was elected tutor to the substitution created and established by the will, conformably to law, and had accepted said charge. The Plaintiff concluded, among other things, that Defendants be declared to have forfeited the rights of usufructuaries, and that they be deprived of such rights; that Plaintiff, *ès qualité*, be, in consequence, declared incommutable proprietor of the property, without being subject to said usufruct; and that Plaintiff, *ès qualité*, be put into exclusive possession of said property, offering to pay the usufructuaries an annual sum in lieu of such usufruct. Two of Defendants, Victor Boudreau and his wife, alleged, that no substitution was created by the will of Simard, and that Plaintiff had been wrongfully appointed tutor to the pretended substitution, and that the *acte de tutelle* was null.

DAY, J.: This was an action instituted by the tutor to a substitution against the *grevé*, seeking the forfeiture of his right of enjoyment, on the ground that he was committing waste and depredation. The court was stopped from entering into the merits of this case, by the question whether Plaintiff had any right in the quality assumed to institute such an action. The court had no hesitation in saying he had not. The tutor to a substitution had merely to look to the taking of the inventory of the property *substitué*, and the investment of the monies, but he had no right as a proprietor, and could not consequently call upon the court to place the property in his hands. If any one has a right of action, it is the *appelé*. The court, however, declined to offer any opinion as to whether the *appelé* could succeed in an action in the present instance. Action dismissed, without costs, the Defendants having based their defence on wrong grounds.

JUDGMENT: The court considering that Plaintiff, in his said quality of tutor to the substitution hath not, by law, any right of action against Defendants, for the causes, matters, and things in the declaration set forth, doth dismiss the action of Plaintiff without costs. (3 *J.*, p. 54.)

LEBLANC and CASSIDY, for Plaintiffs.

T. J. J LORANGER, for Boudreau *et uxor*.

POMINVILLE, for Desjardins *et uxor*.

BILLET PROMISSOIRE.

CIRCUIT COURT, Montreal, 17th February, 1859.

Coram SMITH, J.

MORIN *vs.* LEGAULT DIT DESLAURIERS.

Held : That a *billet promissoire en brevet* made before notaries, payable to a party or his order, is negotiable by endorsement in the ordinary way. (1)

This suit was brought upon a *billet promissoire en brevet*, executed in notarial form, before two notaries, without signature or mark, the Defendant being unable to write, by which Defendant acknowledged himself indebted to one Kimpton, in the sum of £10 18s., which he promised to pay Kimpton, or his order, for value received, in one year from date. The payee, by a transfer *sous seing privé*, written upon the note, made it over to Plaintiff, who sued as holder. The Defendant pleaded that an instrument of such a kind was not a negotiable note, that the transfer was insufficient, and that it should have been notarial to be valid.

SMITH, J. : The paper in question has all the requisites of a negotiable promissory note. It promises to pay, for value received, a certain sum of money to a party named, or his order, at a certain time. The assignment is complete, being equivalent to an endorsation. Judgment for Plaintiff. (3 *J.*, p. 55.)

SNOWDON and GAIRDNER, for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

OPPOSITION TO VEND. EXP.—CREDITS NOT GIVEN.

SUPERIOR COURT, Montreal, 30th December, 1858.

Coram BADGLEY, J.

ESTY et ux. *vs.* JUDD et vir, *and* JUDD et vir, Opposants.

Held 1° That a Defendant is entitled to file an opposition to a *venditioni exponas*, if credit be not given on the face of the writ, for payments previously made, on account of the judgment. (2)

2° That an opposition to a *venditioni exponas* will be maintained where land *en roture* has been advertised to be sold in another parish than where it is situated. (3)

Plaintiffs, after obtaining judgment against Dame Content Judd, one of Defendants, for a sum of £52 12s. 7d., with

(1) V. S. du C. de 1870, 53 V., ch. 33, s. 82.

(2) V. art. 664 C. P. C.

(3) V. art. 671 C. P. C.

interest and costs, took out a writ of *fieri facias* against goods and lands, under which a considerable sum was levied from the sale of the goods and chattels, and, by the judgment of distribution, Plaintiffs and their attorney were collocated altogether for £75 6s. 11d. on account of debt, interest and costs. Two lots of lands were seized under the same writ, but were prevented from being sold by an opposition *à fin de charge*, which was subsequently dismissed. A *venditioni exponas* was then issued for the sale of these lots, and it was to this writ that the present opposition *à fin d'annuler* was fyled by Defendants. Three grounds were alleged by Opposants: 1. that the moveable property of Dame C. Judd had not been fully discussed, a part of what was seized remaining unsold, in consequence of an opposition *à fin de distraire* fyled by Dr. Dorion, which was still pending and undetermined; 2. that the lots were situated in different parishes, and were, notwithstanding, advertised by the sheriff to be sold in the same parish; 3. that previously to the issuing of the *venditioni exponas*, Plaintiffs and their attorneys had received on account of the judgment, the amount already mentioned as awarded to them by the judgment of distribution, for which credit had not been given, nor any deduction made in the writ. The opposition concluded with a prayer that the *venditioni exponas* should be set aside, as illegally issued, or that, if the court should order the sale of the lots in question, or of one of them, such sale should be ordered to be made only for the balance, which should be found to be due by Dame C. Judd. The 2nd ground, as affecting one lot only, was admitted by Plaintiffs in their contestation. As to the other two grounds, it was contended that they were not sufficient to entitle Defendants to fyle an opposition to a *venditioni exponas*; that, moreover, the facts relied upon existed and were within Defendants' knowledge at least two or three months before the day appointed for the sale of the lots under the *fieri facias*, and that it was therefore incumbent upon them to have fyled their opposition then; and that, as to the 1st ground in particular, it was the duty of Defendants, if they chose, and not of Plaintiffs, to have contested the opposition of Dr. Dorion.

LUNN, for Opposants, said he relied chiefly on the 3rd *moyen*, the 2nd being admitted as affecting one lot, and cited the case of *Fournier* and *Russell*, decided in appeal (5 *R. J. R. Q.*, p. 207), in which a similar ground was set up, and was maintained by the Court of Queen's Bench. He contended that the cases were exactly analogous; that, although it was true the judgment of distribution, under which Plaintiffs had received payment of a portion of their debt, was pro-

nounced a considerable time before the day appointed for the sale under the *fieri facias*, yet, that the latter writ was rightly issued for the whole amount, and that, consequently, Defendants were not entitled, or, at all events, it was not necessary for them to fyle their opposition to it ; if they chose to trust to Plaintiffs not to allow their property to be sold for more than was actually due, surely this could not be made the foundation for a charge of negligence against them. They were alarmed, however, when they saw the *venditioni exponas* issued for the whole amount of the judgment in debt, interest and costs, without any notice being taken of previous payments.

BADGLEY, J., referred to the case of *Fournier* and *Russell*, and said he must follow the rule laid down by the Court of Queen's Bench. He would accordingly give judgment, maintaining the opposition with costs, and ordering all proceedings under the *venditioni exponas* to be stayed until the balance due by Defendant should be ascertained.

JUDGMENT : " The Court, considering that, at the issue of " the writ of *venditioni exponas de terris*, there had been " levied of the goods and chattels of Defendant, Dame Con- " tent Judd, in virtue of the writ of the execution issued by " Plaintiffs, against said goods and chattels, lands and tene- " ments, divers sums of money, which have not been credited " to her on the face of the said writ of *venditioni exponas*, " issued against said lands and tenements, and, considering " that the advertisement of sale of the lot of land secondly " mentioned in the sheriff's advertisement of the sale of the " said lands and tenements is irregular, inasmuch as the sale " of the said lot of land was so advertised to be sold at the " church door of the parish of St. Martin, instead of that of " the parish of Ste. Rose, the parish of the locality of the said " lot, doth maintain Opposant's opposition to the extent afore- " said to wit, doth discharge the said writ of *venditioni ex-* " *ponas, quant à présent*, of the said lot of land secondly des- " cribed, and doth order that all proceedings under the writ " of *venditioni exponas*, be suspended until such time as Plain- " tiffs shall have fyled with said writ of *venditioni exponas*, " or any other such writ hereafter to be issued for proceeding " to the sale of said lands and tenements, a statement showing " the exact balance to be levied under the writ. " (3 *J.*, p. 73.)

BÉLANGER, for Plaintiffs.

HEMMING and Lunn, for Opposant.

WILL.—CONSTRUCTION.

SUPERIOR COURT, Montreal, 23rd December, 1858.

Coram C. MONDELET, J.

BONACINA *vs.* BONACINA, *and* GUNDLACK, Tutor, Opposant.

Held: That a will declaring that a farm of the testator should be held by the male heirs of the testator's family, in the manner thereinafter limited, and then, given one half to William and his lawful male heir after him, and one half to Duncan and his lawful male heir after him; and, in the event of William or Duncan dying without lawful heir or issue, giving the share of him so dying to the survivor; and, if both should die without lawful issue, giving the farm to Sophia Mackintosh, and unto her eldest son on taking the name of Mackintosh; and, to prevent all misconstruction, declaring that the eldest son of William and the eldest son of Duncan and no other could inherit the farm, does not mean a bequest of the farm to the eldest son of Sophia Mackintosh, William dying without issue, and Duncan dying leaving no son and only a daughter, so long as Duncan has a daughter.

This case came before the court on an opposition *à fin de distraire*, made by John George Gundlack, in his quality of tutor to William Gundlack Mackintosh, a minor, claiming as the property of Opposant, in his capacity of tutor, certain immoveable property seized under a judgment against Defendant, as the property of Defendant. The OPPOSITION set forth the will of William Mackintosh, of date the 6th September, 1841: whereby it was alleged, among other things, his farm at Lachine should be held and enjoyed by the male heirs of his family in the manner thereinafter limited; that is to say, he gave and bequeathed unto his son Wiliam Mackintosh, and unto his lawful male heir after him, forever, so far as the law of the Province would permit, one half of the property; and, next, he gave and bequeathed unto his second son, Duncan Mackintosh, and his lawful male heir, forever, the other half or part of the property; and that the will did furthermore establish and set forth, that in the event of both William Mackintosh and Duncan Mackintosh dying without lawful issue, then and, in that case, he bequeathed the whole of the Lachine property rest, residue, and remainder of his estate, unto Sophia Mackintosh, and unto her eldest son, on taking the name of Mackintosh: and the testator, in order to prevent all misconception, as he therein alleged, that the eldest son of Duncan Mackintosh, and the eldest son of William Mackintosh, and no other *meaning thereby, and no other issue of Duncan Mackintosh and William Mackintosh, should inherit the property at Lachine;* that William Mackintosh, the son, departed this life on or about the 23rd February, 1842, childless and intestate, and that his half of the Lachine property thereupon became the property of and vested in Duncan Mackintosh, his brother, sub-

ject to the clauses and conditions set forth in the will; that, afterwards, on the 28th June, 1854, Sophia Mackintosh also departed this life leaving William Gundlack Mackinstosh, her eldest son, and heir, under and by virtue of the said will; that, afterwards, on the 28th May, 1856, Duncan Mackintosh, mentioned in the will, also departed this life without leaving a son or any male issue to inherit the Lachine property; and the minor child, William Gundlack, became and was, and is the only lawful male heir as well of William Mackintosh as of Duncan Mackintosh and the Lachine property, as such, became vested in him: that the real estate seized, and advertised to be sold as belonging to Defendant, is part of the real estate mentioned and described in the will, and is the property of Opposant, in his said capacity, and is not the property of Defendant. The Plaintiff contested this opposition, and, by a FIRST PEREMPTORY EXCEPTION, alleged, in terms of the will, the bequest of the Lachine property to William and Duncan Mackintosh; that, after several other special legacies, the testator declared that, as to all the rest, residue, and remainder of the estate, whatever and wherever, and of what nature, kind or quality soever the same might be and not therein before given and disposed of he did thereby give and bequeath the same to William and Duncan Mackintosh, to be equally divided between them; and, in case any or either of them should die without lawful heir or issue, then he gave the share of the one so dying to the survivor; and, if both happened to die without lawful issue, he then gave and bequeathed the whole of the Lachine property, rest, residue and remainder of his estate unto Sophia Mackintosh, and unto her eldest son, on taking the name of Mackintosh; and, to prevent all misconstruction, that his intention was that the eldest son of William Mackintosh, and the eldest son of Duncan Mackintosh, and no other, could inherit the property at Lachine; that the latter clause was put in the will by the said William Mackintosh to explain that, in the bequest he had made to William Mackintosh and his lawful *male heir* after him, of one half of the Lachine property, and to Duncan Mackintosh and his lawful male heir, the other half of the said property, he only meant by the words *lawful male heir*, the eldest of the male children of each of William and Duncan Mackintosh, to the exclusion of all their other male children; that the testator died about the 18th February, 1842; that the legatee, William Mackintosh, died without issue on the 23d February, 1842, and his share in the property thereby reverted to Duncan Mackintosh, his brother, and it is admitted by the opposition; that Duncan Mackintosh married Dame Agnes Bonacina, from which marriage, was begotten Marie

Mathilde, *alias* Mathilda Mackintosh; that the property seized is the Lachine property, mentioned in the will, which, according to the terms thereof, could only revert to Sophia Mackintosh and unto her eldest son, in case both William and Duncan Mackintosh should both die without lawful issue. By a SECOND PEREMPTORY EXCEPTION, Plaintiff said that the will had never been registered in the registry office for the county wherein the land seized was situated, nor had the will been published and registered in the registers of the late Court of Queen's Bench or of the Superior Court, at Montreal, nor in any other court where it ought to have been publicly read and published and enregistered to preserve the substitution created by the will, in favour of Sophia Mackintosh and her eldest son, and that, if Sophia Mackintosh and her eldest son could have claimed any right on the property under and in virtue of the substitution created by the will, they cannot, from the want of such reading, publication and enregistration of the will, invoke such right as against Plaintiff, who is a *bona fide* creditor of Duncan Mackintosh and of his estate.

PER CURIAM: Under the construction of the different clauses of the will, as the court interprets them, the tutor, in his capacity, has no interest in making his present claim. The property in question went to the child of the deceased Duncan Mackintosh.

"The court, considering that Opposant not only is unfounded in law, in his pretensions in favour of his pupil, but shews and establishes himself, as well by his own allegations, as by the will of William Mackintosh, of the 8th September, 1841, that none or no other, but the eldest male heir of either William or Duncan Mackintosh, sons of the testator, could inherit his property at Lachine, and that the daughter of the testator, Sophia Mackintosh herself, or her eldest lawfully begotten son could not inherit such property, unless William and Duncan Mackintosh died without lawful issue, and, whereas Duncan Mackintosh has left a daughter lawfully issued of his marriage with Defendant, who is still living, and, therefore, the property seized is in said Defendant, as well in her own name, having been *commune en biens* with her husband, as in her quality of tutrix to Mathilde, her daughter, issue of her marriage with Duncan Mackintosh, and not in William Gundlack, for whom and in whose behalf the Opposant, his tutor, has fyled the opposition in this cause, dismisses the said opposition." (3 *J.*, p. 80.)

W. E. HOLMES, for Opposant.

CHERRIER, DORION and DORION, for Plaintiff.

As the above decision turns entirely upon the construction to be put upon certain clauses of a will, we give them *verbatim* below :

"It being my will and intention that the property belonging to me, at Lachine, in the District of Montreal and Province of Canada, containing about two hundred and forty arpents in superficies, and all, and singular, the appurtenances thereunto belonging, shall be held and enjoyed by the male heirs of my family, in manner and way hereinafter described and limited, that is to say, I give and bequeath unto my son William Mackintosh, and unto his lawful male heir after him forever, or so far as the law of the Province permits, one half of the said property, containing about three arpents in breadth, by about forty arpents in depth, bounded in front by the River Saint-Lawrence, and in rear by the land of one Leduc, on the east side by the property of the late John Grant and Vennant Roy Lapansé, and on the west side by the other part or half of the said property, and to mark the line of separation stones, and set in the ground at intervals for the purpose, and that the road leading from the front to the rear of the property be common, and serve for both parts. And next, I give and bequeath unto my second son, Duncan Mackintosh, and unto his lawful heir forever, the other half or part of the said property, containing about three arpents in breadth, and about forty arpents in depth, bounded in front by the River Saint-Lawrence, and in rear by the land of one Leduc, on the west side by the estate of the late John Grant, and on the east side by the other half or part of the said property, and to mark the line of separation stones, and set in the ground at intervals as already described. * * * * * *

* * * * * * * * * * * * I give and bequeath unto Miss Jane Mackintosh, Church street, Inverness, out of the above monies, the sum of fifty pounds sterling, annually during her natural life, which my executors will regularly transmit to her, and the rest, residue and remainder, whatever it be, and the funds or securities to be paid and transferred to the said William and Duncan Mackintosh respectively, when, and as they shall severally and respectively attain their several and respective ages of twenty-one years, and that the interest accruing and therefrom, in the meantime, shall be applied towards their education and maintenance respectively, until they shall severally and respectively attain their said ages aforesaid, and that they may get as good an education as the means I leave them will allow, and in case any or either of them shall die without lawful heir or issue, then I give the share of him, so dying, to the survivor, and if both happen to die without lawful issue, I then give and bequeath the whole of the Lachine property, rest and residue and remainder of my estate unto Sophia Mackintosh, and unto her eldest son on taking the name of Mackintosh, and to prevent all misconstruction, the eldest son of the said William Mackintosh, and the eldest son of the said Duncan Mackintosh and no other can inherit the said property at Lachine."

PREUVE.

SUPERIOR COURT, Montréal, 31 décembre 1859.

Before SMITH, Justice.

BONACINA, Plaintiff, *vs.* BONACINA, Defendant, *and* McIntosh, Opposant.

Un testateur lègue à son fils William, et à ses héritiers mâles, pour toujours, en autant que les lois du pays le permettent, la moitié d'une ferme, et l'autre moitié à Duncan, un de ses fils, et ses héritiers mâles, pour toujours, constituant les deux ses légataires universels, donnant

la part de l'un, qui pourrait mourir sans hoirs, au survivant; et, après avoir fait l'énumération des argents qui lui appartenaient, il lègue " à " Jane McIntosh, rue Church, Inverness, la somme de cinquante louis " sterling, à prendre sur les dits argents, annuellement, sa vie durante, " que mes exécuteurs lui transmettront régulièrement."

Le testament ne fut pas enregistré.

William meurt sans enfants, avant Duncan, et la succession immobilière de Duncan, aussi décédé, étant vendue, Jane McIntosh produit une opposition à fin de conserver, réclamant les argents comme ayant une hypothèque en vertu du testament pour le paiement des arrérages des £50 à elle légués.

Sur contestation par la Défenderesse, veuve de Duncan et tutrice d'un enfant mineur issu de son mariage avec Duncan, et par deux créanciers chirographaires aussi opposants :

Jugé : 1° Que les parties contestant, ayant allégué le décès de Jane McIntosh antérieurement au décès du testateur, et que, par là, le legs était devenu caduc, ils étaient tenus de prouver cet allégué.

2° Que le legs fait à Jane devait être pris sur la succession généralement.

The Opposant, Jane McIntosh, was collocated for the sum of £1388 2 3 " on account and in deduction of £2000, claimed " by her, under the will of William McIntosh, her father, " dated 6th September, 1841, proved the 22nd February, " 1842, by which the testator bequeathed to Duncan McIntosh " the immoveable sold, charged with a life rent in her favor of " £50 per annum." This collocation and the opposition were contested by Defendant, the widow of Duncan McIntosh, as well in her own name, as in her quality of tutrix to Mathilda Bonacina, minor child issue of her marriage with her late husband, and also by two chirographary creditors, opposants in the cause. The opposition set up the will and alleged its registration, and that the real estate thereby bequeathed to Duncan McIntosh, and sold in the cause, was hypothecated for the payment of seventeen years arrears of the life rent or annuity, with interest thereon; that, under the will, the testator left his sons, William McIntosh and Duncan McIntosh, his residuary legatees; that William died under the age of twenty one; that Duncan McIntosh took possession of the estate of the testator as heir at law and residuary legatee, and, thereby, became liable for the payment of the rent; and that, on his death, Defendant, Agnes Bonacina, as tutrix to her minor child, issue of her marriage with her late husband, Duncan McIntosh, also became liable to pay Opposant the said legacy. The terms of the will are reported above p. 366.

MONK, Justice: The first point alleged in the contestation is that Jane McIntosh, the legatee, died before the testator, and that the legacy became *caduc*. The Opposant is described as of Inverness, in Scotland, and the question is, on whom falls the onus of proof? I think it falls on the Contestant who alleges it. The will refers to the Opposant as if then living. Mr. Dease, one of the executors, states he has had letters

from her, and has never heard of her death, but the general principle, *ei incumbet probatio qui dicit*, is applicable here; the Contestant has failed to establish this *moyen* of contestation. The *second* point raised is that the legacy was to be paid out of the monies indicated. I am against the contesting party on this point. This is a general legacy of a certain sum payable annually; it is not a legacy of a particular thing, and is, therefore, chargeable upon the estate generally.

As to the remaining *moyen* of contestation, which is, that no mortgage existed in favor of Opposant on the land sold, it is to be noticed that the will was never registered; but, as the contesting party is only a chirographary creditor, the want of registration will not affect the case as presented now. If the will created a mortgage on the property sold, Jane McIntosh would be paid in preference to chirographary creditors, though the will has not been registered; and if it creates no mortgage, then she will rank *au marc la livre*, and this is the pretension of the contesting creditor, whose claim is a general one against the tutrix in that capacity. At the outset of this investigation, it is necessary to bear in mind a principle of law which will scarcely be disputed, that one special legacy is not chargeable hypothecarily, or otherwise, for the payment of another special legacy. (1) The immoveable property sold by the sheriff was bequeathed as a special determinate legacy to Duncan and William McIntosh, the sons of the testator, with substitution and survivorship specifically in favor of their male posterity, for ever, as stated in the will. Both dying without male children, the surviving female child of Duncan McIntosh inherited this particular legacy as her father's heir, in default of male children, who alone could have taken under the substitution. Thus Duncan inherited his brother's share in default of *appelés* to his share, and by survivorship under the will; and Duncan's female offspring takes by inheritance in default of *appelés* to her father's share. It is plain, therefore, that this real estate was bequeathed by special and determinate legacies, and, thereby, and by the substitution of it with survivorship, was taken out of the mass of the testator's succession, and could not originally be chargeable with Jane McIntosh's legacy, either hypothecarily or otherwise.

The judgment of distribution will therefore collocate Jane McIntosh for the capital of her arrears of annuity, *au marc la livre*, with those who have contested her claim. Judgment accordingly. (10 *D. T. B. C.*, p. 79.)

HUGH TAYLOR, for McIntosh.

DORION, DORION and SÉNÉCAL, for Contestants.

(1) V. art. 880 C. C.

EVIDENCE.—RECEIPT SIGNED WITH CROSS BEFORE WITNESSES.

SUPERIOR COURT, Montreal, 18th November, 1857.

Coram SMITH, J., MONDELET, J., BADGLEY, J.

NEVEU père et ux. *vs.* DEBLEURY.

Held: 1st. That the payment of money, in a non commercial case, may be proved by witnesses who witnessed a receipt signed by the party receiving the money, with a cross in their presence. 2nd. That in the examination of such witness it is irregular to begin by asking whether the amount had not been paid. (1)

The action sought the recovery of a sum of £28 12s. 6d. alleged by Plaintiffs to have been paid by them to Sabrevois DeBleury, as attorney for Raphael Brunet, *tutor*, and alleged not to have been paid over by the Defendant to Brunet. The Defendant met the action by a plea of payment to Brunet. The Defendant attempted to prove at *enquête*, by the attesting witnesses to a receipt signed by Brunet with his mark, that Defendant had actually paid Brunet. The witness, Thomas S. Judah, being put the following question: "Examine "Defendant's exhibit number one, and say whether the "money mentioned therein was, in your presence, paid to "Raphael Brunet, mentioned therein, whether this receipt was "read to him, and whether Brunet made his mark in your "presence, and that of the other witnesses subscribed thereto," the Plaintiffs objected to the question, on the ground that it was illegal and inadmissible in tending to prove, by testimonial proof, the payment of a sum over 100 livres, which was illegal: that it tended to prove by a witness the extinction of a judgment; that the payment referred to in the question could only be established by a written proof. The question was reserved by the presiding judge at *enquête*, Mr. Justice Mondelet, to whom it was submitted; and Plaintiffs afterwards moved the court to have the question rejected.

PER CURIAM: The court are unanimously of opinion that the facts under consideration may be legally proved by the testimony of witnesses under our law. This would appear to be sanctioned by the Legislature, on reference to the old promissory note Act, 34 George III, cap. 2, which, in the sixth section, recognized crosses as valid in the case of promissory notes, and it was, therefore, reasonable to say, that, in the case of a receipt, a cross might be proved. But the question, in the present instance, must be rejected, inasmuch as it commenced by asking the witness if the money had not been paid. Motion granted. (3 *J.*, p. 87.)

LORANGER and POMINVILLE, for Plaintiffs.

H. STUART, for Defendant.

(1) V. art. 1222 et 1233 C. C.

RECEIPT SIGNED BY MARK.—EVIDENCE.

SUPERIOR COURT, Montreal, 27th September, 1858.

Coram C. MONDELET, J.

THE SAME PARTIES.

Held : That the payment of a sum of money may be proved by the attesting witness to a receipt signed with a mark made by the party receiving the money.

The facts of this case appear on page 369.

The judgment was in the following terms: La cour, " considérant que le Défendeur est bien fondé dans sa prétention de paiement au nommé Raphaël Brunet, de la somme de vingt huit livres douze schellings et six deniers, reclamée par la présente action, lequel paiement le Défendeur a bien et légalement prouvé par le reçu sous croix en présence des témoins, du cinq août mil huit cent quarante-cinq, étant l'exhibit numéro un du Défendeur, le dit reçu dûment, légalement et suffisamment prouvé ; considérant qu'il résulte de ce qui précède que les Demandeurs n'ont aucun droit d'action contre le Défendeur pour le recouvrement de la dite somme de vingt huit livres douze schellings et six deniers, non plus que pour celle de trente livres seize schellings, par eux réclamée ; maintient les exceptions péremptoires du Défendeur quant à ce, et déboute l'action des Demandeurs. (3 *J.*, p. 88.)

LORANGER and POMINVILLE, for Plaintiffs.

H. STUART, for Defendant.

SAISIE-ARRET AFTER JUDGMENT.—EXCEPTION A LA FORME.

SUPERIOR COURT, Montreal, 18th September, 1858.

Coram BADGLEY, Justice.

MOLSON *vs.* BURROUGHS, *and* THE BANK OF MONTREAL, Tiers-Saisie.

Held : That irregularities and formalities in a *saisie-arrêt* after judgment cannot be attacked by an *exception à la forme*, and that such an exception will be rejected on motion. (1)

This was a motion to reject an exception *à la forme* fyled to a writ of *saisie-arrêt* after judgment, on the ground that the writ is the nature of an execution, and cannot be attacked by exception, but only by opposition.

HEMMING, for Defendant, argued that, though, in one sense,

(1) V. art. 116, 613 et 614 C. P. C.

a *saisie-arrêt* after judgment might be considered as an execution, inasmuch as it was a proceeding in execution of a judgment, yet that it did not, at all, follow that it was identical with a *saisie-exécution*, or that it should be governed by the same rules of procedure. That in the same sense, an action instituted for the purpose of discharging a judgment executory might be considered as an execution, but no one could doubt its being also an action. That the primary object sought by the party issuing a *saisie-arrêt* was to obtain a *transport forcé* of the debt owing by the *tiers-saisi* to the *saisi*, and Defendant was summoned, by the writ, " to appear, to hear the attachment declared good and valid, and further to answer as the said writ requires," as an intervening party for the purposes of seeing that such *transport* was effected in due course of law. That it had been held, in the Court of Appeals, in the case of *Macfarlane* and *Whiteford*, that a *saisie-arrêt* was an " acte d'assignation, par lequel le *saisissant* formule " une demande contre les personnes ainsi citées " ; or, in other words, that the proceedings was, in fact, an action. That the Defendant or *saisi* had the right to intervene, at every step of the proceedings, in order to see that the same were regular and conformable to law ; and, this, not only as to matters between himself and the *saisissant*, but also as between the *saisissant* and the *tiers-saisi*. That it was manifestly impossible for Defendant to exercise these rights if he were restricted to an opposition *à fin d'annuler*, the only pleading that a Defendant is allowed to oppose to a *saisie-exécution*. Moreover, what object could there be in forcing a party who was already before the court, to take upon himself the character of Opposant ? If we looked at the theory of all oppositions, we should find that they were a mean provided by law, whereby a party who was not before the court could, under certain circumstances, bring himself before the court and state how he was aggrieved. But no single instance can be found in the books, of a party, who finds himself already before the court, in any other character being obliged to take upon himself the character of Opposant. Then, again, what rules are to govern as to the delays when such opposition should be fyled. In the case of a *saisie-exécution*, an opposition *à fin d'annuler* must be fyled previous to the sale and return ; but in the case of a *saisie-arrêt*, that would be impossible ; for, it is not until the day after the return day, when the *tiers-saisi* have declared, that Defendant can be sure that there is any seizure at all. Or, the very defect that Defendant may wish remedied, as in the present case, might be that there was no legal return at all. Or contestation might arise between the *saisissant* and the *tiers-*

saisi after the return, in which the *saisi* had an interest to contest ; and if it be contended that it might be fyled any time before the sale, this also would be impossible, as there was no means provided whereby the Defendant should be notified of the sale of the goods seized on the *tiers-saisi* after judgment obtained against him ; and moreover, in the great majority of cases, there is no sale at all. Under these circumstances, it was manifest that Defendant must be allowed to plead, as in an ordinary action. That, even though it should be held that an opposition was the only way of contesting a *saisie-arrêt*, still, inasmuch as the *moyens* set forth in the exception were exactly the same as might be set up by an opposition *à fin d'annuler*, the court would not, therefore, reject the pleading for a more misnomer ; for the court had allowed two pleas, in two cases decided last September term, to stand, although they characterized them as monstrous misnomers, merely on the ground that they were, in substance, good answers. Supposing, however, that these reasons should held insufficient, Plaintiffs have not adopted the proper course in endeavouring to have the *exception à la forme* rejected on motion ; they should have demurred to the same, for the fact of such a lengthened argument being necessary, would tend to prove that it was really a question of law and not of mere practice ; that, in order that a pleading might be rejected on motion, it was necessary that there should be such an irregularity in the fyling of the same as should be patent on the face of it, and such as the court would be bound to notice ; but in the case of *Dechantal* vs. *Dechantal*, there would be found an identically similar proceeding as the present in which the court formally adjudged on the *exception à la forme* therein fyled on its merits, which it would not have done had the fyling of the same been such a patent irregularity as contended by Plaintiffs.

PER CURIAM : This is the case of a *saisie-arrêt* after judgment, which the Defendant meets by an *exception à la forme*, averring that the writ of *saisie-arrêt* was not returned into court until the day following the return day. The case is before the court on Plaintiff's motion to reject the exception. The question is, whether the *saisie-arrêt* after judgment can be attacked by an *exception à la forme* of this nature, as if it were a new action. By the law and practice of our court, the *saisie-arrêt* after judgment is regarded as an execution ; but Defendant has no valid interest in raising such an objection after the return of the writ into court, and after the declaration of the garnishee has been made and fyled of record. Moreover, I have consulted my brother judges, and they all concur with me as to the practice of the court being as I have

stated. (1) The exception must be dismissed. Motion granted, and exception dismissed. (3 *J.*, p. 93.)

BAKER, for Plaintiff.

DORMAN, Counsel.

HEMMING and LUNN, for Defendant.

Authorities cited by Plaintiff: *Saisie-arrêt* is in the nature of an execution. Roger, *Saisie-Arrêt*; as to mode of opposing *saisie-arrêt*, 1 Pigeau, p. 658 and 29, p. 621.

Authorities cited by Defendant: Roger, *Saisie-Arrêt*, pp. 218 and 322; Carré et Chauveau, *Proc. civile*, vol. 4, p. 575; Pigeau, *Proc. civile*, vol. 1, p. 658.

SAISIE-ARRET AFTER JUDGMENT.

SUPERIOR COURT, Montreal, 28th October, 1858.

Coram MONDELET (C.), J.

MOLSON *vs.* BURROUGHS, *and* THE BANK OF MONTREAL, T. S.

Held: That a *saisie-arrêt* after judgment cannot be rejected or dismissed, on motion, for alleged irregularities connected with its return into court.

MONDELET (C.), J.: This is a motion to quash a writ of attachment after judgment, on the ground that it was returned too late, namely, on the day after the day on which it was returnable. Now, if this proceeding, by way of attachment, be an action, the point attempted to be raised cannot be tried by motion; and, if it be an execution, it must be tried by opposition. So that, under any circumstances, the motion must be rejected. (3 *J.*, p. 97.)

JOEL C. BAKER, for Plaintiff.

HEMMING and LUNN, for Defendant.

(1) *Sed vide contra:* The case of Pinsonneaut *vs.* Mailloux, *and* L'Heureux, T. S. (No. 334, S. C.). This was a *saisie-arrêt* after judgment, to which the Defendant pleaded that the T. S. was not the *véritable débiteur*. At the argument, it was contended by Plaintiff's counsel that Defendant could have no interest in pleading such a point, inasmuch as he could have no possible interest in preventing the T. S. from paying his debt thus relieving him from liability to Plaintiffs; and, moreover, that the proceeding by *saisie-arrêt* after judgment was in the nature of an execution, and could not strictly be pleaded to. The court, composed of Justices DAY, SMITH and MONDELET, rendered the following judgment on the 31st day of March, 1856: "The court considering that the attachment, *saisie-arrêt*, is irregular and insufficient, and that the exception of him, the Defendant, in that behalf, is well founded in law, maintaining the said exception, doth set aside, and declare null and void, the said attachment."

POLICY OF INSURANCE.—FORFEITURE.—EVIDENCE.

SUPERIOR COURT Montreal, 28th February, 1858.

Coram SMITH, J.

GRENIER et vir *vs.* THE MONARCH FIRE AND LIFE ASSURANCE COMPANY.

Held: 1st That, under a clause, in a policy of insurance, that if there appear fraud in the claim made to a loss, or false swearing or affirmation in support thereof, the claimant shall forfeit all benefit under such policy, the court will reject the claim of the policy holder, if the Company establish that the claim is unjust and fraudulent, and far in excess of the actual loss, to the knowledge of the policy holder.

2nd That general evidence may outweigh the positive testimony of witnesses, where the evidence of these witnesses is not consistent, and where the presumptions are adduced against its truth.

This was an action brought by Plaintiffs to recover the sum of £585 4s,11d., alleged to be due under a policy of insurance made in favor of one of them, Marie Sophronie Grenier, trading as a *marchande publique*, at St. Hyacinthe. The declaration sets up the policy of insurance; that a fire occurred on her premises, on the 7th May, 1855, by which her stock-in-trade, to the value of £485 4s. 11d, and her household furniture, to the value of £100, were destroyed by fire. The Defendants pleaded, that the loss suffered by Plaintiff was inconsiderable, and would have been less and probably nothing but for her own negligence; that there was an express condition in the policy, in the words following: "All persons insured "by this Company sustaining any loss or damage by fire, are "fortwith to give notice to the Company at their office in "Adelaide Place, London, or its agents, as soon as possible "after (within fourteen days at furthest), are to deliver in as "particular an account of their loss or damage as the nature "of the case will admit of, and make proof of the same by "their affidavit or affirmation, and produce such other evi-"dence as the directors of the Company may reasonably re-"quire. In this account, the property and articles must be "specified in detail, with the quantities, qualities, and prices; "no profit or advantage is to be included in such claim. And, "until such affidavit or affirmation, account and evidence, "are produced, the amount of such loss, or any part thereof, "shall not be payable or recoverable; and if there appear "fraud in the claim made to such loss, or false swearing or "affirmation in support thereof, the claimant shall forfeit all "benefit under such policy." That, by the particular statement produced by Defendants, she represented her loss to be £485 4s. 11d., which statement she had sworn to and delivered to Defendants; that there was in this statement fraud

and false swearing, within the true intent and meaning of the said express condition in the said policy; that Plaintiff must have known, and did know at the time, that this was so, and that her claim was wilfully exaggerated with a view to defraud Defendants; and that she had, therefore, forfeited all benefit under said policy, and was not entitled to recover anything.

SMITH, J., in giving judgment, said: This is an action on a policy of insurance, under which the Plaintiff, Madame Archambault, was insured from May, 1854, to May, 1855, for the sum of £600, of which £500 was on goods and stock-in-trade, in her shop and premises, at St. Hyacinthe, and £100 was on furniture. A fire occurred in her premises before the expiry of the policy, and she handed in to the Company, Defendants, a statement on oath, in which she says that goods to the value of some £500 were absolutely destroyed. The Defendants pleaded that Plaintiff never had or held a stock of such value; that she had suffered no loss; and that the claim was fraudulent and worthless. The question involved in this case is entitled of evidence. Has Plaintiff complied with the terms and conditions of her policy? and is her claim a fraudulent one? With the exception of three witnesses, who are Archambault Plaintiff's son, her daughter, and a law student, by name of L'Amoureux, all the evidence adduced is of a general character. The Defendants adduced evidence to show that there was not on Plaintiff's premises, at the time of the fire, the amount of goods the value of which was claimed by her; in fact, that it was impossible she could have had the stock she had sworn to.

JUDGMENT: "Considering that Plaintiffs have failed to prove the allegations of their declaration, and that she, Marie Sophronie Grenier, suffered the loss for the recovery of which the present action is brought; and, further, considering that Defendants have fully established that the claim of Plaintiffs, set up in and by virtue of the policy of insurance declared on in the declaration, is unjust and fraudulent, and is far in excess of the actual loss by Marie S. Grenier, incurred by the destruction of the property insured under said policy; and, further, considering that the claim was so made with a full knowledge of Plaintiffs that the claim was unjust and fraudulent, and that it was made for the purpose of defrauding the Company, and is therefore in violation of the condition of the policy, and that, thereby, Marie S. Grenier hath forfeited all claim whatever under the policy to recover for any loss actually suffered by her, the court doth dismiss the action." (3 *J.*, p. 100.)

R. and G. LAFLAMME, for Plaintiffs.

CROSS and BANCROFT, for Defendants.

BILL OF LADING.—CONSIGNOR, WHEN NOT LIABLE FOR FREIGHT.

SUPERIOR COURT, Montreal, 30th April, 1858.

Coram BADGLEY, J.

FOWLER *vs.* STIRLING et al.

Held: That a bill of lading, as between the parties thereto, may be explained by parol testimony.

That the vendor of merchandise, who is named the consignor in the bill of lading, is nevertheless not liable for the freight of said merchandise which he had delivered to vendee's agent *before* shipment, according to contract and to the knowledge of the ship's agent.

A bill of lading may be transferred by mere delivery without indorsement. (1)

Action in the form of a *quantum meruit*, for payment of freight. Defendants pleaded, that the iron, for the payment of the freight of which Plaintiff sought to recover from them by his action, was, previous to its shipment, sold by them to W. Darling, of Montreal, that they agreed with Darling to deliver him the iron in Glasgow, and, by Darling's orders, they accordingly delivered it to his agent, T. C. Orr, a shipping agent of that city, and also agent of Plaintiff's vessel, and by whose orders it was shipped on board of that vessel. That Darling had agreed with Orr for the shipment of his iron; that the bill of lading stated a specific agreement, and that the freight was recoverable only from the party with whom that agreement had been made.

CROSS, for Plaintiff: In this case, the ship claims her freight from the consignors, as the original contractors. The shipment was made by them under a bill of lading, wherein they are named the consignors, and Meikleham of Montreal, consignee, to whom it appears the iron was charged as vendee, in invoice emanating from Defendants. The only question is one purely of evidence, and that is whether Defendants are consignors, and as such, original contractors. The bill of lading appears to have been made out by Mr. Maxwell, the general manager and agent for Defendants' business, he also made out the accounts, charging the goods to Meikleham. They were put on board the vessel by Defendants, under the bill of lading so made out, Defendants' privity as consignors is therefore clearly enough established, and, as such, their liability in law is beyond doubt. It does appear that, in February previous, one Mr. Darling employed Orr, at general shipping agent, to engage freight for him for this iron, which it appeared Darling had ordered from Defendants' manufactory for March delivery at Glasgow, that Orr, acting on this engagement,

(1) V. art. 2420, 2421 et 2422 C. C., et *Fowler* et *Meikleham*, 5 *R. J. R. Q.*, p. 303.

had secured freight by the "Diana," a vessel to sail in March, placing at the time in the Defendants' hands the written order of Darling's agent for the delivery of the iron, but that it had not been shipped in pursuance of this order, nor by Orr's agency, that the fact of Orr being ship's broker for the California, at the time the iron was shipped in May, under the bill of lading in question, had no effect upon the contract nor the liability of Defendants, as Orr had not acted as Darling's agent, nor made the shipment either in his own or Darling's name, and Defendants' had, by their own act, elected to be themselves the consignors. So far as Orr was agent, for the ship, he could only bind it within the scope of his employment, and, by acting in the capacity of ship's agent: now the contract and the facts shewed that the shipment was made by and in the name of Defendants as consignors, and there could be no presumed intention to make, through Orr's instrumentality, a different contract, and for other parties. As to Orr's supposed agency for Darling, unless he acted in that name and capacity, he could neither bind the ship to Darling, nor Darling to the ship; both he and his clerks swear positively that, as regards the shipment, they did not act for Darling, a fact that could not be doubted, seeing that Defendants' own act precluded the possibility of such being the case. They also prove the agency for Darling to have been of a special character and terminated long previously, but, whether Orr was agent for Darling or not, if even the agency which terminated in March had subsisted in May, he could only give Darling the benefit of the contract and involve him in the responsibility of it, by acting in his name, which he did not do; Defendants had all the benefit of the contract as they thereby reserved to themselves the entire control over the goods, Defendants are the only parties privy to the contract, Darling is not. The ship cannot be compelled to look beyond the immediate parties to the contract, nor can these parties be absolved under pretence that others are interested. The Defendants are consignors, and as such liable. The consignors are besides, as regards the ship, the actual proprietors, and the only proprietors they can recognize of the goods, being vendors without delivery, and retaining the powers of proprietors. As to the words in the bill of lading," freight for the "said goods to be paid by the consignee as per agreement, at "the rate of primage and average accustomed." These are to be construed as part of the context, and if ambiguous, in a sense adverse to the pretensions of the persons who wrote them, they could, however, only imply that a rate of freight had been previously named, which the writer of the document could not for the moment specify, this could not control nor

change the nature of the agreement, nor is any separate specific agreement proved with regard to the rate, it should therefore be the prevailing rate at the time.

POPHAM, for Defendants: In the first place, the form of the action is bad. The bill of lading upon which it is based, is not filled up in the ordinary form, but says," freight to be paid," &c., "*as per agreement.*" Now a *quantum meruit* cannot lie upon a specific contract. 1 Saunders Pl. and Ed., 82. The Defendants cannot be held for the freight, because they made no contract to be so direct or implied. It is proved that the iron was delivered to Darling, in Glasgow, according to his directions to them. Orr, to whom Darling desired the iron to be delivered, received the iron from them, as Darling's agent, and, therefore, they were *not* the shippers of the iron, and, consequently, not liable for the freight. A bill of lading, as between the parties therein mentioned, may be explained by parol testimony. 7 Taunton, *Wilson* vs. *Hart*, 304. It was, therefore, competent for Defendants to show, and they have shown, that, although mentioned as the consignors of the iron, in the bill of lading, they were, in reality, not so, but simply the vendors of iron delivered before shipment to the vendee, Darling, who had made an agreement with the ship's agent for the carriage of the iron, and who received it at Glasgow, on behalf of Darling, and who caused it to be placed on board Plaintiff's vessel. The vessel also acquiesced in the contract between Orr and Darling by signing the bill of lading, wherein it was stipulated that the freight was to be paid *as per agreement.* If the agreement which Defendants have proved to have been made between Orr and Darling, was not the one here alluded to, it was incumbent on Plaintiff to have shown which he has not done, what was the nature of his agreement, and between whom it was made before he could recover upon that document. It is not proved that Defendants agreed to deliver the iron in Glasgow, in March, and had they done so, the vendee waived this obligation by his acceptance of the *delivery in* April. The iron was legally delivered to the vendee, in Glasgow, before the shipment and the validity of *this delivery could* not be effected by the mention of Meikleham's name as the consignee, as he has been proved to have been merely the vendor's agent, and he delivered the bill of lading to Darling before the ship's arrival at this port, so that he suffered no inconvenience thereby. The delivery of the bill of lading to Darling, *without* indorsement, was a sufficient transfer. Story, on contracts, No. 810; 6 Espinasse, *Dobbin* vs. *Thorton*, 16; Long, on sales, pp. 175, 302.

BADGLEY, J.: In 1853, "Darling and Co" received from Defendants a quantity of iron goods, as ordered, and, by letter

of 3rd October of that year, remitted to the latter a bill for £500 0s. 0d. on account, requesting to be informed of the usual difference of rate made by Defendants in the execution of orders for different descriptions of their wares. By a letter, in November following, a remittance was advised of the balance £167 0s. 2d. and added, " you may book for me 80 tons bars " for shipment in March, the specifications will follow in a " week or two. P. S. I have given Mr. Meikleham the bill of " lading and the duplicate of this order." This Meikleham was Defendants' general agent, at Montreal, for the transaction of their business and for procuring orders in their line of trade. By letter of 25th November following, Defendants, through their managing clerk, Maxwell, replied to the letter of October, acknowledging the receipt of the bill, and observed, " we have advised Mr. Meikleham that we have entered your " order for 80 tons of bars, at £10 per ton, usual terms," which they particularize as a time credit at the selling rate or the payment of cash with a discount. Subsequently, however, Darling and Co., having been informed that their specifications could not be furnishe l, made out " corrected specifications " of iron which were delivered to Meikleham, dated 19th January, 1854, for execution by Defendants, and, at the same time, by their letter to John Darling, at Edinburgh, the brother and agent of the writer, directed the latter to obtain freight for the ordered iron from Thomas C. Orr, a shipping agent at Glasgow, and which, after several communications between these two, by letter and telegram, was secured at fifty shillings per ton. By a letter of 1st March, signed *John Darling for W. D.*, and sent to Meikleham, at the works near Glasgow, Defendants, through him, were directed to have delivery made to Orr for shipment, and, by another letter, of the same date, from John Darling to Orr himself, after reference to the communications between them respecting the iron and the freight, the former adds, " Please, at earliest con- " venience, send me the name of the vessel, the consignee is " Mr. William Darling." John Darling further mentions to Orr, his orders to Defendants, for the delivery of the iron to him, Orr, for shipment. Subsequently, Defendants are informed by Orr of this intimation by Orr's clerk, and when the goods were ready for shipment, they were marked W. D., and Defendants received Orr's directions respecting their delivery on board, which appears to have been attended to. *It was at first supposed by John Darling that the goods would be ready for shipment in March,* but the late period at which the corrected specifications reached the manufacturers, Defendants, prevented their being shipped by the " Diana " a vessel on the berth for Montreal and under Orr's agency. In May follow-

ing, when the goods were ready, Orr directed their shipment on board of two vessels also in his agency, the larger portion by the "California," and the balance by the "Mary." The orders of John Darling were for the delivery of the goods to Orr for shipment, and Orr, finding they could not go by the "Diana," directed Defendants, by Maxwell, their managing clerk, with whom Orr and his clerks had intercourse respecting the goods, to send to the Broomielaw, for shipment by the "California" and "Mary;" no change in the transactions between Darling and Defendants had taken place and the orders for the goods remained uncancelled. Maxwell establishes the fact of the goods having been sent to and shipped upon those vessels by the directions of Orr, who, at the precise time of the shipments, was absent from Glasgow, but his shipping transactions were attended to by his shipping clerks. The invoice was made out in Meikleham's name and the bills of lading were filled up in the usual manner by Maxwell, showing that the goods were shipped by Defendants to Meikleham, with the stipulation "freight for the said goods to be paid by the consignee as per agreement." The invoice and shipper's copy of the bill of lading were transmitted to Meikleham, at Montreal, by whom they were received some time previous to the arrival of the "California" which first reached her port, and, at once, delivered over by Meikleham to Mr. Darling, the real consignee, who afterwards passed the entries for the goods in his own name with the usual oath of property to the invoice and paid the duty. With the invoice and bill of lading in hand, he claimed and obtained delivery of the goods as his own property from the ship, neither the ship master, nor the ship consignee making objection to the delivery to him, as the consignee of the goods. It is for the freight by the "California" that this action has been instituted and the same freight has already given occasion to two courses of litigation. The first originated in a demand by the Defendants against Mr. Darling, to pay the price of iron, which he resisted upon the ground of short delivery of the iron ordered, but was unsuccessful, the judgment against him being founded upon the fact that he had assumed to ask as the owner of the iron and received delivery of it from the ship's side, and had made no complaint until long after the vessel's departure from this port. The judgment of the Superior Court was affirmed in appeal upon the similar grounds, and the amount was paid to Defendants through the sheriff. The freight, however, remaining unpaid, the shipmaster, Plaintiff, sued Meikleham, as the consignee, under the bill of lading and failed upon the ground of the perfected delivery of the iron to and acceptance by M. Darling, and that, under

the circumstances of the case, no liability attached to Meikleham. The judgment of the Superior Court was also affirmed in appeal, and from English decisions. All the cases are collected, commented and compared in recent editions of Abbott, on shipping, from the leading case in 1790, *Pearson and others* vs. *Wilkes*, down to Domett against Beckford, 5 B. and Adol. 521, by Lord Denman, which has not been disturbed, and the rulings invariably went upon the simple ground "that the clause in the bill of lading being introduced merely for the benefit of the master and ship owner did not make it compulsory on the latter to withhold the delivery of the goods until payment of freight by the consignee, and, consequently, that the owner of the goods was not discharged from his liability by the neglect of the ship owner to obtain payment from the consignee." "The law will imply from the fact that the goods were laden on a ship to be conveyed from—— to——a contract by *the owner of the goods* to pay for the carriage. *J. Parke Domett* vs. *Beckford.* This general principle is, however, governed by an exception which is thus stated in the above references and expressed by Flanders, 540. "But it is declared, if the goods *are not owned* by the consignor, and are not shipped on his account and for his benefit, in that case, the carrier is not entitled to call on him." Having met with no success in that proceedings, Plaintiff now turns upon Defendants, as the shippers of the goods, and sues them for the freight as consignors under the bill of lading. The principles of law applicable to the ordinary cases of the liability of consignors for freight are clearly stated by Flanders in his works on shipping, No 539. "But whilst the liability of the consignee is admitted where he receives goods under a bill of lading such as described, it does not follow that the consignor is exempt. There is no shifting of liability. The contract of the consignor and consignee is not considered to be inconsistent with each other, each is an original contract upon a sufficient consideration, 5 B, and ad. 521; 2 Gale and Dav., 244 and 17 Johns, 234." In commercial transactions, nothing is more common than that there should be several persons, all of whom are liable for the same thing; and, in this country (the U. S.), the cases all proceed upon the principle that the clause in the bill of lading "the consignee paying the freight," is introduced for the benefit of the carrier not of the consignor. The principle as applied in the United States, it is needless to observe is adopted from English decisions and jurisprudence. It is fully recognized in the authorities cited upon the general principle above mentioned, but is also established in 3 Kent Com., 221-222, M. and M., 157, 17 Johns, 234, Abbott, on shipping, 511, with Sergeant Shee's note at same

page, and may, therefore, be considered indisputable. The question that remains, does this doctrine cover this case, must be answered from the facts in evidence. It is proved that W. Darling of Montreal had previous dealings with Defendants of a similar kind with his last order: that, upon his inquiry, he was informed by them of their terms for credit or cash; that he sent his order to them and directed his agent in Edinburgh to procure freight from Orr, a ship agent at Glasgow, specially selected by himself; that the agent did engage and agree with Orr for the freight at a named price, did order Defendants, through Meikleham, to deliver the goods to Orr, and transmitted to the latter a delivery order for the purpose, together with an intimation of the order sent to Defendants to deliver to Orr. That Orr personally and by his shippings clerks directed the goods to be sent from Defendants' premises to the broomielaw for shipment on board of the "California;" that the goods were so sent and shipped; that no specific agreement was ever made or entered into between Defendants, the shippers and ship master; that the bill of lading was made out by Maxwell and contained the clause as to the consignee *paying freight "as per agreement,"* which could only refer to the agreement for freight between J. Darling and Orr; that the invoice and bill of lading were transmitted by Defendants to Meikleham, their agent in Montreal, who at once delivered them over to W. Darling, by whom the necessary entries were made as of his own goods and paid duties on them, and to whom delivery was made by Plaintiff, at the ship's side, without objection or refusal by Plaintiff, or any objection thereto by the ship's consignee, and, finally, that W. Darling's order was thus executed by Defendants and shipped and delivered to him in due course, at Glasgow, leaving it entirely in his own option to adopt the credit or cash condition of its liquidation. From this state of facts, it is manifest that the goods were W. Darling's from the time they were sent for shipment; that they were shipped for his benefit and advantage, and that Defendants were not the owners of them. "Where goods are sent from a vendor to a vendee, the delivery of them to the carrier usually vests the property in the vendee, and he is the person to sue the carrier for the loss of them; 8 T. R., 330; 3 Bos. and Pul., 585; 2 Camp., 36. In fact and in law, Defendants ceased to be owners of the iron when it reached the ship's side, where it was both actually and constructively delivered to Orr, in the double capacity of ship's agent and agent for the purchaser W. Darling in Montreal. No liability can therefore attach to Defendants from any actual or presumed ownership of the goods being in them. But it may be said this evidence cannot override the

written contract, the bill of lading produced, in which Defendants style themselves shippers and *ergo* consignors. But a bill of lading is merely the shipmaster's formal acknowledgement of his having received certain goods on board for certain parties, his obligation to deliver them in like good condition and the stipulation of a rate of freight payable by the consignee, &c. The bill of lading is, however, not conclusive. See *Bates* vs. *Todd*, 1 *Moo* and *Rob*, 106. Tindal (Ch. J.) said " that as between the original parties, the bill of lading was merely a receipt, liable to be opened by the evidence of the real facts," &c. And this point is sustained by corroborative authorities.

The evidence of record shews that the goods shipped were the property of Darling, not of Defendants, at the time of shipment, and that Orr, the ship's agent, who directed their shipment and had made the agreement for freight with W. Darling's agent knew this well, moreover, the declaration is only in assumpsit, alleges ownership of the goods as in Defendants, nor any particular facts against them to subject them to liability. Under these circumstances, their liability does not appear to be established, and Plaintiff's action cannot be maintained. Action dismissed. (3 *J.*, p. 103.)

CROSS and BANCROFT, for Plaintiff.

J. POPHAM, for Defendants.

FALSE IMPRISONMENT.—NOTICE OF ACTION.

SUPERIOR COURT, Montreal, 28th February, 1859.

Coram BADGLEY, J.

MCNAMEE *vs.* HIMES.

Held: That a party, *bona fide*, and reasonably believing himself to be authorized by a statute, though he be not, is entitled to a month's notice of action under 4 and 5 Vic., c. 25, and 14 and 15 Vic., c. 54. (1)

2. That the plea of want of notice in such a case is, in fact, a general issue and cannot be touched by a demurrer. (2)

This was an action of damages for false imprisonment. The Defendant alleged that, for the causes of action set forth in Plaintiff's declaration, Plaintiff was bound to give Defendant notice in writing of the action, and of the cause thereof, one calendar month at least before the institution of the suit. The Plaintiff demurred to the plea, because there is no law nor statute in this province requiring the notice of action

(1) V. art. 22 C. P. C.

(2) V. art. 136 et 147 C. P. C.

referred to in said plea in cases of the nature of this cause; and because the issue tendered by such plea, being one of law, the Defendant's conclusions for a trial by jury cannot be granted on such law issue.

BADGLEY, J.: This action is in damages for false imprisonment. The Defendant has pleaded the facts which gave occasion to the arrest, and by which he proposes to establish that he was acting under the statute for such cases provided. He also pleads the want of a month's notice of action, which should have been given in conformity with the statute. The Plaintiff has demurred to this last plea, and the demurrer must be dismissed. It must be observed that the Provincial Larceny Act, 4 and 5 Vic., cap. 25, has been copied almost in every particular of language and provision from the British Statute, 7 and 8 Geo. IV, c. 20, for the same object. By both acts, the owner of stolen property may apprehend the thief, even without a warrant; and, by both, the protection of the statute is given to every person acting *bona fide* under its provisions, by affording him a month's notice of action, with the plea of general issue and special matter in evidence. The british and provincial statutes being similar in the particular provisions involved in this case, the jurisprudence of the english courts will obviously guide our decisions in this province in cases under similar circumstances. In this case, the point turns upon the *bona fide* belief of Defendant that he was acting under the statute. The act was not made for those who act in conformity with its requirements, but for the protection of those who might act against it, but yet under the belief that they acted under its provisions. Lord Tenterden observed, in *Beechey* vs. *Sidis*: " If he acted lawfully, he " would not require any notice whatever. The intention of the " section of the act was to protect persons acting illegally, but " in supposed pursuance of the statute, and with a *bona fide* " intention of discharging their duty under the Act of Parlia- " ment." " It has uniformly been held, that, where a party, *bona fide*, believes or supposes he is acting in pursuance of an Act of Parliament, he is within the protection of such a clause": 9 Barn. and Cr., 808, 809; so also the Court of Exchequer, in *Hughes* vs. *Buckland*, 15 M. and W., 354 and 5. In this case, Parke (B.) says " the act is general in its terms, and gives jurisdiction to all persons for all acts done in pursuance of it. These words do not mean acts done in *strict* pursuance of that act; because, in such a case, a party would be acting legally, and, therefore, would not require protection. The words, therefore, must be qualified by the decisions; and, then, the meaning will be, that a party, to be entitled to protection, must *bona fide* and reasonably believe himself to be authorised by

the act. From the foregoing, it will also be seen that the act must be taken to be general in its terms, and not to be confined to peace officers, &c., but to extend to all persons believing that they act under it. The notice of action may always be demanded when the party prosecuted had reasonable ground for supposing the thing done by him was done in execution of or under the authority of the statute." *Cooke* vs. *Leonard*, 6 Barn and C. R., 355; *Cann* vs. *Clapperton*, 10 Ad. and El., 582. The plea of notice is, in fact, a general issue, and cannot be touched by a demurrer. The point involved is a matter for the jury, not for the court. Demurrer dismissed. (3 *J.*, p. 109.)

M. DOHERTY, for Plaintiff.

W. A. BOVEY, Attorney for Defendant.

EDWARD CARTER, Counsel.

Authorities cited by Defendant's Counsel: Imperial Act, 7 and 8 Geo. IV., cap. 29, sections 63, 75 (*Collyer's Crim. Stat.*); Provincial Act, 4 and 5 Vic., c. 25, sections 55 and 67; and 14 and 15 Vict., c. 54; *Beechey* vs. *Sidin*, 9 Barn and Cress, 806; *Reed* vs. *Cowmeadow*, 6 Adolphus and Ellis, 661, etc.; *Hughes* vs. *Buckland*, 15 Meeson and Welsby, 344; *Jones* vs. *Gooday*, 9 Meeson and Welsby, 835.

LOUAGE.—PRIVILEGE.

COUR SUPÉRIEURE, Montréal, 31 mai 1854,

Présents: DAY, J., SMITH, J., et C. MONDELET, J.

BROWN *vs.* HOGAN et al.

Jugé: Qu'un piano loué par un commerçant de piano à une personne qui l'emploie pour donner un concert, n'est pas sujet au privilège du locateur de la salle où le concert est donné.

This was an action, begun by process of *saisie-revendication*, by a piano-dealer against the Defendants, described as hotel-keepers, to recover back a piano, which had been lent by the Plaintiff to a person of the name of Warr, for the purpose of giving a concert, in a room, in the hotel of the Defendant. Warr left the town, without paying for the use of this room, and the Defendants retained the piano, pretending they had a lien on it for the *dépens d'hôtelage*.

DAVID and RAMSAY, for the Defendants, contended that the 175 article of the Coutume gave the lien under which Defendants claimed to retain the piano until Warr's bill was paid, that the coutume having used the word "biens" this right covered every kind of moveable, and that they were equally liable, whether the proprietor or person who had put them there had boarded in the hotel or not, and that the expression,

dépens d'hôtelage, ought not to receive a narrow dictionary interpretation as it was evident, from the after-use of the word *hôtelés*, that it did not simply mean expenses of entertainment, but rather all expenses incurred by a traveller in a hotel, whether for his own intertainment, or for the protection and accommodation of the *biens* placed there by him.

DORION, in reply, contended that the lien was only acquired when the hotel-keeper was acting within the ordinary scope of his business; that, in this case, Warr took the room on purpose to give a concert.

The court sustained the pretension of the Plaintiff.

MONDELET (C.), J.: In support of the judgment of the court, said, that the room was let to give a concert in it, that it did not appear that Warr was even a boarder in the house, and that the Plaintiff Brown had never lost the possession of the piano, as the key had been kept by one of his employé. Judgment for Plaintiff. (*P. D. T, M.*, p. 83.)

MOTHER GUILTY OF MISCONDUCT.—INCAPACITATED AS TUTRIX.

SUPERIOR COURT, Montreal, 28th February, 1859.

Coram BADGLEY, J.

MITCHELL, Petitioner, *and* BROWN et al., Defendants.

Held: That a *tutelle* will not be set aside, on the petition of the mother of minors, upon the ground that the tutor appointed is not a relation, if it appear that the mother, from her habits and character, is totally unfit to be appointed tutrix herself, and that there is no objection to the fitness of the tutor appointed, and that there has been no irregularity in the proceedings for his appointment and that there are no other relatives of the minors within the jurisdiction of the court except the mother.

Maria Mitchell, widow of Thomas C. Speirs, presented a petition, setting forth, that her husband died, at Montreal, about the 1st of March, 1858, leaving five minor children, all females, issue of her marriage with him, the eldest aged thirteen years, and the youngest thirteen months; that, on the 24th of March last, John O. Brown, a stranger to the children, and, in the absence of Petitioner, and without her knowledge and consent, and without any right to do so, present a petition for the appointment of a tutor and subtutor to said minors, and caused to be assembled the requisite number of friends, in default of relatives of the minors, to give their advice upon his petition, and without her knowledge and consent, caused himself to be appointed tutor, and George Nunn, subtutor to the minors; that the *assemblée* was composed of entire strangers to the children and their mother; that the

tutor had removed the children from her custody, so that she was deprived of their keeping and comfort; that by law, she was entitled to the custody of her children, in preference to all other persons, and concluded that the appointment of tutor and subtutor be set aside and annul, and that the court would order that a new appointment be made in the usual manner. To this petition Defendant pleaded, that, long before and at the time of her husband's death, Petitioner was and had ever since continued to be a person of intemperate, dissolute and disorderly habits and character, totally unfit to have the care and custody of the children; that she was a notorious drunkard, and had been frequently, both before and since the death of her husband, taken into the custody of the police of the city, for drunkenness and disorderly conduct in the streets, and was utterly incapable of maintaining the children, and bringing them up in a proper manner. That, in fact, long before her husband died, as well as afterwards, she neglected to take any care or charge of the children, but left them in a helpless and utterly destitute condition, so that they were supported by the charity of Defendants and other persons interested in their welfare; that the appointment of tutor was made in conformity with the advice of a competent number of friends of the minors, with the full knowledge of Petitioner, and after the observance of all the formalities required by law; that Brown was, in every respect, a fit and proper person, *idoïne, capable et suffisant*, to be a tutor of the minors, and was appointed, because of the drunken habits and disorderly conduct of the mother, and her consequent total unfitness to have the care and guardianship of the children, and that it was essential in their moral and physical welfare, that some other guardian than the mother should be appointed, and because there were no other relatives within the jurisdiction of the court. The Petitioner denied that her habits and character were such as Defendant alleged, and said that, sometime previous to the death of her husband, she received from him a blow upon the head, which so disabled her, that she was obliged to go into the hospital; and that it was only, while suffering from the effects of the blow, that her children were, if ever, neglected by her; and that, if she were ever guilty of the bad conduct referred to, it was while suffering from the effects of said blow and the crual treatment of her husband, but that she was, before, and has been since, a person of proper conduct, and as such entitled to the direction of her children.

BADGLEY, J.: The Petitioner was married, as by certificate of Rev. Mr. Wilkes, to her husband, Thomas C. Speirs, in 1845, to whom she bore five female children, who, at the date

of her petition, were of tender years, as by baptismal certificates of Rev. W. Bond, the eldest being about 13 years, and the youngest, 13th months. The parents, for late years previous to the husband's death, had led a miserable life; he was a man of violent temper, and had become almost blind and incapable of procuring support for his family, while Petitioner had become a reckless drunkard, finding means to continue her intemperance, but none for her family, constant broils ensued between them, aggravated, doubtless, by the destitution of the family, his inability to procure food and raiment for them, and her utter abandonment to intemperance, until finally, in his rage, he struck her so violently, that the stupidity of drunkenness under which she labored at the time, was converted into insensibility, and, it is supposed, fearing that he had actually killed her outright, he committed suicide upon himself, by cutting his own throat; kind neighbours, and, among the number, Respondent, who had previously charitably assisted the unfortunate family, interested themselves for them all at this unjuncture; they procured admission for the insensible Petitioner into the Montreal General Hospital, and gave food and clothing to the children and provided for their care and protection. This occurred on the 28th of February last, and, in the issuing 1st of March, the deceased husband was buried after a coroner's inquest had been duly had. In the state of destitution into which the children were thrown, with no relative but their mother, and no friend but those who had extended kindness and charity to their parents and themselves, it was considered proper to place the almost orphans *en tutelle* for the care and supervision of their persons. The mother was discharged, as convalescent, from the hospital, on the 22nd day of March last having recovered from the effects of the violence committed upon her, and from an incipient attack of delirium tremens produced by intemperance, and, on day of her discharge, was notified of the intention to appoint a tutor to her children, the notice intimating time and place for the appointment. She did not appear at the *assemblée* which took place on the 24th of March last, and Mr. Brown was duly appointed tutor, and from which office her petition prays that he may be removed, and another *assemblée* had for another appointment, because he was so appointed without her knowledge or consent; because he took her children from her care and custody, and removed them to parts unknown; because she has been deprived of the comfort and keeping of her children, and is, by law, entitled to their care and custody in preference to all other persons. Respondent has put in issue her personal unfitness to have the care and charge of the children, by reason of her intemperance

and dissolute habits past and present, and this issue she has accepted by her replication, alleging her good conduct previous as well as subsequent to the *tutelle*. It must be observed, *in limine*, that the children had no relatives but their mother, and no friends but those who protected them after their father's death, and, further, that no imputation, morally or personally, has been cast upon the tutor, the objection as to him resting upon the fact merely of his being a stranger. Hence, it must follow that, if her personal and natural right, as a mother, her maternal fitness, is not established, there can be no reason for setting aside this appointment for the purpose of making another, of an other stranger. Now, as to the main point, the mother's fitness, the testimony is conclusive, that she had been sottishly intemperate, for a long time before the unfortunate occurrence detailed above, and that the ill habits previously acquired stuck by her even after her discharge from the hospital. Her intemperance since that time is also established, and has shewn her to have been the inmate of the police station house. Unlike anger, intemperance is proved to be no short madness and such habits and misconduct independent of the established facts of her inability to support herself, her precarious employment for her own subsistence, by occasional labour, and without a home for herself, render manifest her unfitness to have the charge or care of these young female children. The law has wisely left a discretion in the judge in this respect, and assumes to itself the protection and supervision over children, against the notorious ill conduct and dissoluteness of parents, wherever the law is called upon to act. It is, at all times, difficult to deny a parent's claim to the care of her children, but that claim must rest upon moral and personal fitness of character, and not upon profligate qualities which must lead the children to vice and immorality. The case cited on the part of Petitioner has no application to this matter: there, a jew grand-father was appointed tutor provisionally to his grandchildren issue of his christian daughter in law during her minority, *attendu la minorité de la mère;* upon attaining her legal majority, she claimed and obtained the *tutelle* of the persons of her children. There was no question in that case of personal unfitness, and cases are not wanting which have decided against the parent, by reason of *une inconduite notoire*, see Dalloz, *tutelle*, p. 726, &c., and a number of authorities. In this case, Petitioner's misconduct renders her (the mother) personally unfit, and the petition being unsupported by proof in the other particulars must be dismissed with costs. It is only necessary to add in conclusion that all proper access to the mother, upon proper occasions, should be allowed.

" The court, considering that the established misconduct of Petitioner, *inconduite notoire*, for a long time previous, as well as subsequent to the appointment of Respondent to the tutelle sought to be set aside to the minor children, issue of her marriage with Thomas Speirs deceased, renders her altogether unfit to receive and take such *tutelle*, and considering that the tutor is not charged with any moral or personal unfitness or incapacity, nor is any such proved against him, in or by reason of the discharge of the duty of his office, and considering that the children have no relations whatever to whom the tutorship could properly be given, and, finally, that the allegations in the petition contained have not been proved, doth dismiss the petition." (3 *J.*, p. 111.)

MARCUS DOHERTY, for Petitioner.

SAMUEL W. DORMAN, for Defendants.

ACTION EN BORNAGE.

SUPERIOR COURT, Montreal, 28th October, 1858.

Coram BADGLEY, J.

LAMBERT *vs.* BERTRAND.

Held, in an action *en bornage*, where the Plaintiff's title showed a deficiency in superficies and the Defendant's title showed a uniform width throughout the whole depth of his property, and where line fences and ditches were proved to have existed, to a certain extent, between the two properties,—that the division line should be run in the direction of the said fences and ditches, but so as in any case to give the Defendant his full breadth and depth, according to his title.

This was an action *en bornage*. In Plaintiff's title-deed, his land was described as containing two arpents, in front, by thirty arpents, in depth, less a supposed superficial deficiency of 2¾ arpents. The Defendant's deed, on the other hand, claimed a uniform width of two arpents, throughout the whole depth of 30 arpents.

JUDGMENT: " Considering that the property of Plaintiff, as appears by the deed of sale to him made thereof, was deficient in breadth, on the line of the depth thereof, and such deficiency has been established to have existed during the possession thereof by his *auteurs*, and that the property of Defendant has always been of the full extent of two arpents in front by thirty arpents in depth; and, considering that the division line between the said two properties has been partially established and acted upon by the parties, or the *auteurs* of the said parties, before the institution of this action, and that there did exist, by line fences and ditches, along the said

line, running backwards from the front to the depth of about ten arpents; doth order, *avant faire droit*, that, by a sworn land surveyor, to be named by the parties, within eight days, at the office of the prothonotary of this court, and, in default thereof, to be named *ex officio*, by this court, or by one of the Judges of this court, in vacation, a line of division be drawn between the said respective properties of the parties, Plaintiff and Defendant, and boundaries be fixed, determined and established. at the place where the property of Plaintiff touches and joins the land of Defendant, according to the titles of the parties; but, so that in the extension of the said division line, from front to rear, the same shall, as far as may be, run in the direction of the fences and ditches, and so as, in any case, to give Defendant his full breadth and depth aforesaid, according to his titles, the parties present or after having been duly notified: of which operation, the surveyor is hereby ordered to make a report to this court, with all due diligence, together with a figurative plan (descriptive) of the premises. (3 *J.*, p. 115.)

SICOTTE and CHAGNON, for Plaintiff.

CHERRIER, DORION and DORION, for Defendant.

GARDIEN.—REVENDICATION.

SUPERIOR COURT, Montreal, 28th October, 1858.

Coram C. MONDELET, J.

PALSGRAVE *vs.* SÉNÉCAL et al., and PRIEUR, gardien, Petitioner.

Held: That the *gardien* of moveable property cannot during the pendency of the seizure, compel the surrender to him of such moveable property by the Defendant, in the absence of positive proof that the Defendant is deteriorating it by improper use.

This was a petition by a *gardien* under a *saisie mobilière*, for an order on Defendants to surrender the possession of the property seized, on the ground that Defendants were making use of the same against the will of the *gardien*, and that the effect of their so doing was to expose the property to deterioration and damage. The application was resisted on the ground, that, if the *gardien* wished for possession of the property, he should have taken it into his own possession at the time of the *saisie*; and that, as he had not done so, but had left the property in the hands of Defendants, he could not now complain, unless he proved that Defendants were making an improper use of it. The property here seized was a printing press; and Defendants had done nothing more than use it in a legitimate way, namely, by printing with it.

" Considérant que le gardien, F.-X. Prieur est mal fondé en sa requête, attendu qu'il n'avait aucun droit de s'emparer de la presse d'imprimerie dont il est question, dans le but de l'enlever, de sa propre autorité, comme il l'établit lui-même par les affidavits de sa requête, et qu'il n'est pas en droit de se plaindre du refus des Défendeurs de laisser le gardien enlever la presse.

" Considérant que Prieur n'a aucunement établi ni prouvé que la presse d'imprimerie se détériore par l'usage qu'en font les Défendeurs, ou se détériorera en telle sorte qu'il y ait juste cause d'ordonner que déplacement en ait lieu, et que les Défendeurs cessent d'en avoir la possession, suivant la loi. Renvoie la requête. " (1) (3 *J.*, p. 116.)

F. P. POMINVILLE, for Petitioner.

R. Mackay, Counsel.

DOUTRE, DAOUST and DOUTRE, for Defendants.

CAUTIONNEMENT.—COUR CRIMINELLE.

SUPERIOR COURT, Montreal, 30th December, 1858.

Coram BADGLEY, J.

THE ATTORNEY GENERAL, pro Regina, Informant, *vs.* BEAULIEU.

Held : In case where a party accused of subornation of perjury has been arraigned and pleaded not guilty, and no day certain has been fixed for his trial, and no forfeiture of his bail has been declared, that the mere failure of the party to answer, when called, in the term subsequent to that in which he was arraigned, cannot operate as a forfeiture of such bail. (2)

PER CURIAM : This is an action on a bail bond. It would appear that Alexander Louis Pappen had been arrested for subornation of perjury, and that Defendant and one Croteau had given bail for his appearance. Pappen was subsequently arraigned and pleaded not guilty, but no day was fixed for his trial. In the following term he was called but failed to appear, and, now the Crown sues the bail as for a forfeiture. This is plainly irregular, and as none of the formalities for the escheatment of the recognizance on which the information was based were observed, the information must be dismissed. (3 *J.*, p. 117.)

LEWIS T. DRUMMOND, Attorney General *pro Regina.*

EDWARD CARTER, for Defendant.

(1) Authorities cited by Petitioner's counsel : Jousse, Ord. of 1667, art. 15, tit. 19 ; Pothier, *Proc. civ.*, ch. 2, art. 5, sec. 3 ; 4 Carré, Q. 2055.

(2) V. *S. R. C.* de 1886, ch. 179.

CONTRAINTE PAR CORPS.

SUPERIOR COURT, Montreal, 30th December, 1858.

Coram BADGLEY, J.

CAMPBELL et al. *vs.* BEATTIE.

Held : In the case of a *rébellion de justice*, that no mitigating circumstances can prevent the issuing of a *contrainte par corps*. (1)

PER CURIAM : This is a rule for a *contrainte par corps* against Defendant for *rébellion de justice*. It would appear that the bailiff charged with the writ of execution went to Defendant's house, to effect the seizure, but Defendant being, at the moment upstairs, the bailiff waited below, and entered into conversation with the clerk, in the course of which he expressed himself freely respecting the conduct of Defendant, and particularly, referred to a judgment which had been put in execution the day before, as a sham. The Defendant soon came down, and more conversation followed, irritating in its nature. The bailiff handed him the warrant, and while he was looking over it went behind the counter to make the seizure. The Defendant, thereupon, took him by the collar, the clerk opened the door, and the bailiff was put out. The *recors*, finding themselves of no further use, followed. Within half an hour, however, Defendant convinced that he had acted unwarrantably, proceeded to the office of Plaintiff's lawyer, and said that he felt he had done wrong, that he had been provoked to it, but that they might now go and make the seizure, and he would not offer any opposition. He went also to the sheriff's office, and spoke to the same effect. Up to this time, no return had been made. The only question is, does the case come under the ordinance ? There can be no doubt that it does ; and, although there are many mitigating circumstances connected with the affair, the Defendant had no right to take the law into his own hands. It was held by the Court of Appeals in the case of *Mercure* and *Laframboise* (4 *R. J. R.Q.*, p. 322.) where the Defendant's conduct was merely negative, he looking out of an upper window and refusing to open the door when the bailiff rang the bell, that the *contrainte* must go. I cannot therefore refuse the writ in a case like the present, where the bailiff has been violently ejected. Rule absolute. (3 *J.*, p. 118.)

A. and W. ROBERTSON, for Plaintiff.

GEORGE MACRAE, for Defendant.

(1) V. art 569 C. P. C. et art, 2273 C. C.

EXECUTION.—OPPOSITION.

SUPERIOR COURT, Montreal, 30th December, 1858.

Coram BADGLEY, J.

MCBEAN *vs.* DEBARTZCH, and DEBARTZCH et al., *Mis en cause, and* DRUMMOND, Opposant.

Held : That an execution, issued on a judgment against several Defendants jointly directed against one of them, for the whole debt, is illegal and will be set aside on opposition, without even a tender of the amount really payable by such Defendant. (1)

This was an opposition *à fin d'annuler*, fyled by one of the *mis en cause*, on the ground that the judgment was against the *mis en cause* jointly and not severally, and that the writ of execution was directed for the whole debt against the Opposant alone. Plaintiff contested on the ground that the debt was an hypothecary one, in respect of certain property held by the *mis en cause*, as proprietors, and was therefore due by them solidarily, and that Opposant was, moreover, bound to tender with his opposition the proportion of the debt which he, at all events, admitted he owned.

PER CURIAM : I am with Opposant. This seizure is plainly irregular, and I must therefore set it aside. Opposition maintained. (3 *J.*, p. 118.)

H. TAYLOR, for Plaintiff.

C. J. DUNLOP, for Opposant.

SOCIETE.—ACTION PRO SOCIO.

SUPERIOR COURT, Montreal, 31st December, 1858.

Coram SMITH, J.

PEPIN *vs.* CHRISTIN dit ST. AMOUR.

Held: That one copartner cannot, after the dissolution of the firm, sue another copartner to render on account, without himself offering and rendering an account. (2)

PER CURIAM : This is an *action pro socio.* A variety of pleas have been fyled, which it is unnecessary to notice here, as there is a point of law involved in the case which is fatal to Plaintiff's action. Plaintiff is equally *comptable* with Defendant, and, until he offer and tender an account himself, he can have no action against his copartner, to compel him to render an

(1) V. art. 555 et 581 C. P. C.

(2) V. art. 1898 C. C.

account. There being no offer or tender of such account by Plaintiff, the action must necessarily be dismissed. Action dismissed. (3 *J.*, p. 119.)

LOUIS BÉLANGER, for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

EXECUTION.

SUPERIOR COURT, Montreal, 31st December, 1858.

Coram SMITH, J.

SANDERSON *vs.* ROY dit LAPENSÉE, and ROY dit LAPENSÉE, Opp.

Held : That, where two executions issue, at the suit of different parties, against the same Defendant, the sheriff cannot unite both seizures in one *procès-verbal.* (1)

PER CURIAM: This is an opposition *à fin d'annuler* fyled by Defendant, assigning several grounds, but the only point which has attracted the attention of the court is that the sheriff has made out but one *procès-verbal de saisie* under the two executions, namely, the one in this case, and the other in N° 8, *Palliser* vs. *Roy* dit *Lapensée.* Now, altho' I think the law allows the sheriff to act upon the two executions together, yet, inasmuch as they are separate and independent seizures, there must be a *procès-verbal* for each, so as to conform to the requirements of the ordinance of 1667. I must, therefore, maintain the opposition. Opposition maintained. (3 *J.*, p. 119.)

MORISON, for Plaintiff.

LORANGER and LORANGER, for Defendant and Opposant.

ENREGISTREMENT.—BAILLEUR DE FONDS.

COUR SUPÉRIEURE, Montréal, 31 mars 1859.

Coram SMITH, J.

LYNCH *vs.* LEDUC, et MATHIEU, Opposant.

Jugé : Qu'un bailleur de fonds, qui n'a pas enregistré dans les délais fixés par la 16e Vict., chap. 206, est primé par l'acquéreur subséquent qui n'a pas assumé la dette due au bailleur de fonds, et qui a enregistré avant le bailleur de fonds primitif. (2)

Le Demandeur ayant fait vendre, sur un jugement hypothécaire, une terre possédée par le Défendeur, et l'argent étant

(1) V. art. 559 C. P. C.

(2) La s. 6 du ch. 206 des S. du C. de 1853 (16 V.) contient la disposition suivante ; tout bailleur de fonds dont le titre ou droit de bailleur de fonds a été

rapporté devant la cour, deux oppositions à fin de conserver furent produites, l'une par Antoine Mathieu, l'autre par le Demandeur. Antoine Mathieu fondait son opposition sur un acte d'échange, passé le 3 fevrier 1851, avec F. Secours dit Maska, qui avait reçu en échange la terre vendue en *cette* cause, et s'étaient chargé de payer à Mathieu une soulte qui n'avait pas été payée, lors du décret, et que l'opposition réclamait avec privilège de bailleur de fonds. L'enregistrement de cet acte n'avait été effectué que le 4 avril 1855. Le Demandeur, fondait son opposition sur une obligation à lui consentie, avec hypothèque sur la terre vendue, le 22 mai 1855, par Pierre Bélard dit Latour, alors propriétaire de la terre. L'enregistrement de cet acte avait été effectué le 25 mai 1855, *postérieurement à l'enregistrement de Mathieu.* Le rapport de collocation ayant colloqué Mathieu de préférence à Lynch, ce dernier contesta le rapport. Le 9 décembre 1852, François Secours, qui avait reçu en échange de Mathieu la terre décrétée, échangea la même terre avec Antoine Bonhomme, sans aucune soulte, et l'acte fut enregistré le 6 avril 1853, *avant* l'enregistrement de l'échange entre Mathieu et Secours. Le 25 avril 1853, Antoine Bonhomme échangea la même terre avec Pierre Latour, le débiteur de Lynch, sans soulte, et l'acte fut enregistré le 27 octobre 1854, encore *avant* l'enregistrement de l'échange entre Mathieu et Secours. Lynch prétendait que, Mathieu n'ayant pas enregistré son titre dans le délai fixé par la 16e Vict., chap. 206, sect. 6, c'est-à-dire, dans les 6 mois du 14 juin 1853, date de la sanction du statut, Pierre Bélard dit Latour avait acquis la pleine et entière libération de l'hypothèque de Mathieu, lorsqu'il consentit l'obligation sur laquelle était fondée l'opposition de Lynch, et que, ce dernier ayant le droit de se prévaloir de tous les moyens de droit dont pourrait se servir son débiteur pour repousser une demande en déclaration d'hypothèque de la part de Mathieu, il aurait dû être colloqué de préférence à Mathieu. La cour, adoptant ces motifs, a maintenu la contestation de Lynch, et a ordonné la réformation du rapport de distribution (3 *J.*, p. 120.)

DOUTRE, DAOUST et DOUTRE, pour Lynch.

LEBLANC et CASSIDY, pour Mathieu.

acquis subséquemment à l'opération de la dite ordonnance (4 V, ch. 30) qui, à l'époque de la passation du présent acte, n'aura pas fait enregistrer conformément aux dispositions de la dite ordonnance, et des actes amendant la dite ordonnance, le titre créant ou constituant son droit de bailleur de fonds, sera tenu de le faire enregistrer dans les six mois qui suivront la passation du présent acte ; et à défaut de ce faire, tel droit de bailleur de fonds, sera nul et de nul effet quelconque à l'égard de tout subséquent acquéreur, donataire, créancier hypothécaire, prévilégié ou judiciaire, en vertu d'une bonne et valable considération, tel qu'exprimé en la dite ordonnance. " V. art. 2100 C. C.

MARITAL AUTHORIZATION.

CIRCUIT COURT, Montreal, 17th February, 1859.

Coram SMITH, J.

BENJAMIN and al. *vs.* CLARKE and vir.

Held: That an action to recover the price of goods sold and delivered to a married woman, separated as to property from her husband, will not be maintained, without proof that the husband expressly authorized the purchase by his wife.

The declaration of Plaintiffs alleged the marriage of Defendant, Clarke, to her husband, the other Defendant, and that, by marriage contract, previously entered into, it was agreed between Defendants, that each of them should separately enjoy, manage and administer his and her property, and be liable and responsible separately, each for his and her debts, the husband for that purpose fully authorizing his wife; that Defendant, Clarke, subsequently was indebted to Plaintiffs in the sum of £35 9s. 8d. for goods sold and delivered by them to her, which sum she had promised to pay. The Defendant's (Clarke's) plea was to the effect, that the goods had been sold to her husband and not to herself; and that, by her marriage contract, it was agreed that he should bear all household expenses, of which the amount sought to be recovered formed a portion.

PER CURIAM: This is the case of the purchase of goods, in a shop, by a wife separated as to property, without the express authorization of her husband. The action cannot be maintained according to the well known principle of our law, that a married woman cannot bind herself, without the express authorization of her husband. This principle was affirmed by the Court of Appeals, in July, 1846, in the case of De Rouville and al., Appellants, and the Commercial Bank, Midland district, Respondents, 1 Revue de Législation, 406 and seq. The action is dismissed. (3 *J.*, p. 121).

B. DEVLIN, for Plaintiffs.

MONK and MACRAE, for Defendants.

VENTE.—LOUAGE.—PRESCRIPTION.

SUPERIOR COURT, Montreal, 1st March, 1859.

Coram SMITH, J.

BELL *vs.* RIGNEY et al., *and* MILNE, Opposant.

Held: 1st. That where goods are bought at a judicial sale, no delivery is necessary to pass the property. (1)

2nd. That *tacite reconduction*, in relation to moveables, only arises when the lessor is a dealer and makes a business of letting moveables. (2)

3rd. That parties remaining in possession, after expiry of lease, will be deemed to hold them as owners. (3)

In this case, an *alias* writ of execution issued against the goods and chattels of Defendants, under which a seizure was made. The Opposant, by an opposition *à fin de distraire*, claimed a portion of the goods seized, as having acquired them under a former writ of execution against Defendants, alleging that, at the time he acquired them, the 1st of April, 1854, he made a lease of them to Defendant, who remained in possession for two years, the term of the lease, and afterwards to the time of seizure, in virtue of the same which was continued by *tacite reconduction*. The opposition being contested was dismissed.

SMITH, J.: The Opposant purchased the goods he claims at a judicial sale; the law presumes delivery and no *déplacement* of the goods was necessary. At the time of sale, the Opposant leased the goods to Defendant, for the term of two years, which term was up in April, 1854, but he claims that the lease was continued by *tacite reconduction*. The only question then here is, can the lease be extended to an indefinite period, so as to defeat the presumption of law arising from the Defendant's possession that he is proprietor. There is no doubt that *tacite reconduction* exists in favor of landlord, in reference to leases of real property, but it is only extended to moveables in one case, that is where the party is in the habit of letting moveables. We find this doctrine in various authors. *Pothier* gives some examples, *Louage*, N°s 370-371, citing the case of the *tapissier*, who lets for the purpose of furnishing an apartment; 4 Duvergier, n° 234 and seq. In the present case Opposant not being in the habit of letting, there can have been no *tacite reconduction*. The lease then expired in 1856, and, as Defendant remained in possession, and as nothing to

(1) V. art. 1472 C. C.

(2) V. art. 1609 C. C.

(3) V. art. 2268 C. C.

the contrary is shewn by Opposant, the goods must be held to be Defendant's, *possession vaut titre.* The opposition is dismissed. (3 *J.*, p. 122.)

McKay and Austin, for Opposant.

A. and W. Robertson, for Plaintiff contesting.

LOUAGE.—PRIVILEGE.

Superior Court, Montreal, 31st March, 1859.

Coram Smith, J.

Pearce *vs.* The Mayor, Aldermen and Citizens of the City of Montreal.

Held: That the lessor of a concert room has no lien on a piano temporarily placed there for an evening concert, for the rent of the room, as against the proprietor of the piano, who is not the lessee of the room.

The declaration alleged that Plaintiff was proprietor of a piano, of the value of £160, which he had temporarily deposited in the City Concert Hall; that, since said deposit, Defendants, against the will of Plaintiff, withheld the same, to his damage of £50. The conclusion was in revendication, and that Defendants pay £50. The plea alleged that Defendants had leased the room, in November last, for one evening, for a sum of £10, to Charles Elliott who had placed the piano there; that they knew nothing of Plaintiff in the matter, and that Defendants had a lien and privilege upon the piano for said rent, before Plaintiff could remove it.

Per Curiam: Plaintiff has established his right of property. Defendants have pleaded a lien or *droit de rétention*, alleging that they have the privilege of landlords. I am against this pretension, and give judgment in favour of Plaintiff.

"The court, considering that Plaintiff hath established the material allegation of his said action, and that he is the proprietor of the piano seized. And, further, considering that Defendants have failed to maintain and establish in law any right of privilege over the piano as set forth, or any right of lien over the piano, for the payment of the sum due and owing by Elliott. And, considering, further, that Plaintiff, by reason of the illegal detention of the piano, after due notification to deliver up the same to Plaintiff, hath suffered damage, to the amount of £7 10s. 0d. The court doth overrule the exception and doth condemn Defendants, within 15 days after service of this judgment, to restore and deliver up the piano to Plaintiff, and, in default of so doing, within the 15 days, to pay, as and for his damages in this respect, the sum

of £150, and the further sum of £7 10s, 0d. as and for his damages, by reason of the illegal detention. (1) (3 *J.*, p. 122.)

W. E. HOLMES, for Plaintiff.

J. PAPIN, for Defendants.

ENQUETES.—APPEAL FROM INTERLOCUTOR.

SUPERIOR COURT, Montreal, 7th March, 1859.

Coram C. MONDELET, J.

Enquête sittings.

SCOTT et al. *vs.* SCOTT et al.

Held: That proceedings at *enquêtes*, in a cause, will be suspended to enable a party appealing from an interlocutory judgment, to apply to the Court of Appeals, for the allowance of an appeal of which he has given notice to the other side.

Application was made, on behalf of Defendants, for an adjournment of the *enquêtes*, under the following circumstances. During the previous term of the court, a law hearing had taken place on a *défense en droit* to Plaintiffs' declaration, and answers in law to two of Defendants' pleas. A judgment had been rendered dismissing the *défense en droit*, and ordering *preuve avant faire droit* on the answers in law. The Plaintiffs inscribed the cause on the *rôle des enquêtes*, and, on the same day, Defendants gave notice of an application to the Queen's Bench, for the allowance of an appeal from the interlocutory judgment so rendered on the law hearing. On the 1st of March, no Court of Queen's Bench was held, in consequence of a division of opinion of the Judges, as to whether there was a quorum of competent Judges of that court; Defendants lodged their motion with the clerk of the court, as directed in such cases by the Judicature Act of 1857, and now produced a certificate of the clerk of the court to that effect, certifying also, that proceedings could not be had thereon, in consequence of the decision of the judges that no court could be held. The Defendants, now, urged, in support of their application for a postponement, that having a right of appeal, they had done all the diligence in their power to avail themselves of that right, that it was not the intention of the law that they should be deprived of their remedy, nor that they should incur any forfeiture of right, resulting from a cause over which they had or could have no control; that the Judicature

(1) *Vide* case of *Nordheimer et al.* vs. *Hogan et al.*, 7 *R. J. R. Q.*, p. 38.; and *Brown* vs. *Hogan et al.* S. C., Montreal, No 2655, A.D., 1854, *supra p.* 385.

Act of 1857, by allowing applications to be lodged with the clerk, on the failure of a competent court, had intended to afford the parties the benefit of their diligence, and that it would be a hard case, if, from the fault of the executive, in delaying the nomination of a sufficient number of judges of the higher court, Defendants should be deprived of their rights. On the part of Plaintiffs two points were submitted: 1st, That the judgment was not one susceptible of being appealed from; 2nd, That nothing short of a rule of the Queen's Bench granted, ordering Plaintiffs to shew cause why an appeal should not be allowed, could have the effect of suspending proceedings. As to the first point, it had been determined in the case of *Gugy* vs. *Sutherland*, that there was no appeal from an interlocutory judgment dismissing a *défense en droit* to a declaration; because it was susceptible of remedy by the final judgment, which was the case in point, as the remainder of the judgment decided nothing against Defendants, it did not dismiss any of the pleas, on the contrary, it allowed them to remain until the final judgment, when the question still remained open as to their validity. On the second point, the terms of the 24th section of the Ordonnance, 25 Geo. III, cha. 2, clearly meant that proceedings should not be suspended in any case, when an appeal was sought, until the higher court interposed its authority, by granting the rule, the terms of the law were plain, and the law had not been altered; that the Judge here was seized of the cause and proceeding with it was a duty that could only be interrupted by the active interposition of the authority of the higher court, and it was incumbent on the party making the application, as well to shew the law authorizing the judge to grant it, as that it was a proper case for the exercise of such authority; that so far from admitting as a sufficient reason that the executive had neglected their duty, by not providing for the competency of the Queen's Bench, the Judge, by considering it, would accommodate himself to the convenience of that authority of which he was supposed and recognised to be independent; that giving the judgment Defendant asked for would be equivalent to making a law where one did not exist, for the justification of the executive, and would adopt their blamable acts as a *motive* for the judgment, acts for which Plaintiffs could be in no degree responsible, besides, as the judgment was in their favour, they were for the present presumed to be right, a presumption which could not be for the time invoked in favour of Defendants, and assisting them to a supposed remedy, under the circumstances, would be conniving at the frustration of proceedings.

MONDELET, J.: As to the first point, it is not for me to de-

cide whether the cause be appealable or not, that is a question for the determination of the Queen's Bench, I can have nothing to do with it. As to the second, there are two questions, the first is as to the intention of the law. The second involves what is most vital to the rules by which society is governed by our system, viz., the independence of the Bench, in the uninterrupted exercise ef its functions. The law gives me no authority to postpone a cause under like circumstances: I cannot exercise that authority by the law, because it has not so declared, but, although it does not grant the power it is not prohibitory. As to the other question, when the executive violates the law, in place of providing for its administration, as they are bound to do, for, I do not hesitate to say that, for years, the executive have culpably violated the law, by not providing for the efficiency of the courts, and, when parties go on with their cases, and do all in their power, do all they are bound to do, are they to suffer from this cause, God defend us from such a conclusion. If I can aid them, without violating the law, I am disposed to do so, but, must not save for excellent reasons, I cannot suspend the proceedings, but can exercise a discretion, and will, therefore, order an ajournment of the *enquête*, until the fourth *enquête* day in June, by which time an opportunity will be afforded for Defendants to make their application, in case the term of that court be held on the first of June, the day fixed by law. (3 *J.*, p. 132.)

CROSS and BANCROFT, for Plaintiffs.

CARTIER and BERTHELOT, for Defendants.

ENQUETES.—JUDGE IN BANCO SUPERIOR.

SUPERIOR COURT, Montreal, 20th March, 1859.

Coram SMITH, J.

THE SAME CAUSE.

Held : 1° That a Judge sitting *in banco* may revise and reverse the ruling of another Judge of the Court sitting at *enquête.* (1)

2° That the ruling of a Judge at *enquête* is wrong which suspends proceedings at *enquête*, to enable a party, appealing from an interlocutory judgment, to apply to the Court of Appeals for the allowance of an appeal of which he has given notice to the other side.

The same arguments were renewed, on a motion by Plaintiffs for a revision of Judge MONDELET'S ruling at *enquête*, it being further urged by Plaintiffs, that Judge MONDELET had adopted, as a justification for his judgment, the very

(1) V. art. 319 C. P. C.

reasons he denounced in pronouncing it, there being no other grounds for giving it, and those being wholly untenable in law; also, that the pretended exercise of a discretion was a frustration of Plaintiff's legal remedy, and an arbitrary exercise of authority which the Judge had no warrant or permission for in law.

SMITH, J.: The only law which applies to the case, is the ordinance of 1785; that gives an appeal from an interlocutory judgment, but the appeal must be allowed; there must be something done by the higher court to interrupt the proceedings here, without that, the Judge has no authority. The law says, that an appeal may be had "from any interlocutory sentence "or judgment, in certain cases, provided always, that such "appeal shall not be granted and allowed, except upon motion "made in the Court of Appeals for that purpose, and a rule "served upon the other party, or his attorney, to shew "cause, &c." The rule so served shall have the effect to stay execution, in such interlocutory judgment, till the determination of the motion in appeal. This is imperative and binding on the Judge here. There is nothing shewn, by which Defendants will lose any right, and it is not to be presumed. A Defendant may do many things to interrupt and delay a Plaintiff's proceedings, and it may be his interest to do so, if he is likely to lose his case, but the Judges cannot imagine rights for him which the law has not given. It was the intention of the Legislature to take away, or deny any such right or appeal, until the order of the higher court was granted. The only ground for operating a suspension of proceedings by the ordinance, it is granting of the rule or order of the court, to shew cause. It is argued that the notice, under the circumstances, is equivalent to it; but the notice is the mere private act of the party, and an appeal may never be granted on it. The object of the provision, in the ordinance, was to prevent delays and chicane of parties requiring suspension of proceedings, under pretence of mere notices of appeal. It is asked to suspend the proceedings on the ground of a simple application to have been made to the higher court, and its failure for want of a court. The Judges can take no cognizance of such reasons, nor can they know any thing of the causes which delay the efficiency of the higher tribunal; they have nothing to do with these, nor are they responsible for them; they must allow the responsibility to rest where the law has placed it. The motion is granted. (3 *J.*, p. 134.)

CROSS and BANCROFT, for Plaintiffs.

CARTIER and BERTHELOT, for Defendants.

GARDIEN.—REVENDICATION.—OPPOSITION.

COUR SUPÉRIEURE, Montréal, 30 décembre 1858.

Coram BADGLEY, J.

DONALLY *vs.* NAGLE, et MCDONALD, Opposant.

Jugé : Que le gardien d'effets saisis n'a aucun intérêt et est non recevable à opposer la vente de ces mêmes effets saisis subséquemment par un autre créancier durant la contestation soulevée sur la première saisie. (1)

Les effets mobiliers du Défendeur avaient été saisis, dans une cause portant N° 1998, à la Cour Supérieure, à Montréal, à la poursuite de John McGinnis, Demandeur en garantie, et l'Opposant avait été nommé gardien. La vente sur cette saisie fut suspendue par une opposition à fin d'annuler. Durant la contestation de cette opposition, le Demandeur fit saisir les mêmes effets, et un autre gardien fut appointé à cette seconde saisie, le 10 juillet 1858. (2) Le 21 juillet 1858, le gardien McDonald produisit une opposition à fin d'annuler, à l'encontre de cette seconde saisie, dans laquelle il relatait les faits ci-dessus, en alléguant que, par la loi, il était tenu à la représentation de ces effets, même par corps, et, par laquelle, il concluait à la nullité de la seconde saisie, et, de plus, à ce qu'il fut ordonné que, vu la dénonciation par lui faite de sa qualité de gardien, les procédés en la cause actuelle fussent suspendus jusqu'à jugement sur l'opposition en la cause No 1998, dans laquelle il avait été constitué gardien, ou, au moins, jusqu'à due notification de la saisie en cette cause au premier saisissant McGinnis, jusqu à ce que l'Opposant pût être déchargé valablement de la garde des effets saisis. Cette opposition fut contestée par le Demandeur, sur le principe, que le fait d'une saisie antérieure, dans laquelle l'Opposant avait été nommé gardien des mêmes effets, n'avait conféré aucun droit à l'Opposant pour l'autoriser à retenir possession de ces effets, et à empêcher la vente et qu'il n'avait aucun intérêt. Après audition, sur la défense au fond en droit, la cour a renvoyé cette opposition. (3 *J.*, p. 135.)

LEBLANC et CASSIDY, Avocats du Demandeur.

SICOTTE et CHAGNON, Avocats de l'Opposant.

(1) V. art. 866 C. P. C.

(2) V. art. 577 C. P. C.

FAITS ET ARTICLES.

COUR SUPÉRIEURE, Montréal, 28 février 1859.

Coram BADGLEY, J.

LACROIX *vs.* PERRAULT DE LINIÈRE.

Jugé : Qu'un directeur d'une compagnie est tenu de répondre aux interrogatoires sur faits et articles qui lui sont proposés concernant les différentes transactions faites par le bureau de direction. (1)

Le Demandeur, qui est actionnaire et un des directeurs de la compagnie du chemin de fer de Montréal et Bytown, comme créancier de cette compagnie, poursuivit le Défendeur pour le montant de ses actions dans cette compagnie. Par ses défenses, le Défendeur allègue que le Demandeur est non recevable en sa demande, vu ses qualités d'actionnaire et de directeur, et nommément en ce que certaines transactions du bureau de directions ont eu l'effet de ruiner le crédit de la compagnie, et de la faire tomber en déconfiture. Le Demandeur ayant été interrogé sur faits et articles, touchant ses transactions qui eurent lieu durant sa charge de directeur, répondit qu'il ne connaissait rien.

Le Défendeur fit motion, le 23 février 1859, que le Demandeur soit tenu de répondre, distinctement et catégoriquement, aux quatrième, huitième, onzième, treizième et quatorzième interrogatoires sur faits et articles à lui soumis par le Défendeur, et auxquels il n'a point répondu, ainsi qu'il était tenu de le faire, et en autant que le Demandeur, comme étant un des directeurs de la compagnie du chemin de fer de Montréal et Bytown, est tenu de connaître les faits dont il est question dans les interrogatoires; et, à défaut par le Demandeur de répondre aux interrogatoires, dans le délai qui sera fixé ; à ce qu'iceux soient tenus pour confessés et avérés.

" LA COUR, après avoir entendu les parties, sur la motion du Défendeur, accorde la motion, et, en conséquence, ordonne au Demandeur de comparaître devant cette cour, le premier jour d'enquête, en mars prochain, pour là et alors répondre *de novo*, et catégoriquement, aux quatrième, huitième, onzième, treizieme et quatorzième interrogatoires sur faits et articles, à lui soumis par le Défendeur. " (3 *J.*, p. 136.)

CHERRIER, DORION et DORION, pour le Demandeur.

LAFRENAYE et PAPIN, pour le Défendeur.

(1) V. art. 221 C. P. C.

PROCEDURE.—PLAIDOYERS.

COUR SUPÉRIEURE, Montréal, 26 février 1859.

Coram BADGLEY, J.

SARAULT *vs.* ELLICE.

Jugé : Que l'exception de paiement et la défense au fond en fait peuvent être valablement opposées à une demande, et ne sont pas incompatibles ni contradictoires.

Le Défendeur ayant invoqué, par sa première exception, la prescription trentenaire, plaida, en second lieu, une exception de paiement, tout en niant les allégués de la déclaration du Demandeur, et, en dernier lieu, il plaida une défense au fond en fait. Le Demandeur fit motion à ce que le Défendeur fût tenu de faire option entre ses défenses affirmatives et sa défense au fond en fait, et qu'à défaut de ce faire, il demanda le rejet des trois défenses.

" Considering that by law and the existing jurisprudence of Lower Canada, the affirmative plea of payment and the plea of general issue may be pleaded together in the same action, and that Defendant is not, in law, held to make his option of one the said pleas, and to abandon the other of them." (3 *J.*, p. 137.)

FLEMING, pour le Demandeur.

ROSE et MONK, pour le Défendeur.

OPPOSITION.—MOTION.

COUR SUPÉRIEURE, Montréal, 28 février 1859.

Coram BADGLEY, J.

LA COMPAGNIE DE PRÊT ET D'EMPRUNT DU HAUT-CANADA *vs.* DOYLE, *et* STANLEY, Opposant.

Jugé : Qu'une opposition qui, par un amendement subséquent des procédés qu'elle attaque n'a plus aucune raison d'être, doit être renvoyée sur une motion, mais sans frais. (1)

L'Opposant sur qui une règle pour folle enchère avait été obtenue, le 24 décembre 1858, fit une opposition à fin d'annuler le writ de *venditioni exponas de terris,* sur ce que la règle pour la folle enchère avait été accordée contre George E. Stanley, tandis que son véritable nom et celui sous lequel il avait acquis la propriété saisie est George J. Stanley. La Demanderesse fit motion, après le rapport de cette opposition par le shérif, que ce dernier eut à amender son rapport en constatant que la pro-

(1) V. art. 135 C. P. C.

priété avait été réellement adjugée à George J. Stanley. Cette motion ayant été accordée et le rapport du shérif ayant été amendé en conséquence, le 23 février 1859, la Demanderesse fit alors motion: "Qu'en autant qu'il appert par l'amendement fait par le shérif au rapport ou retour par lui produit en premier lieu, que le rapport est maintenant correct, et en accord avec les allégués de l'opposition produite par l'Opposant, et que, par conséqent, la dite opposition n'a plus aucune base, la dite opposition soit rejetée. Que, de plus, en autant qu'il appert également par les procédés que George Joseph Stanley s'est rendu adjudicataire, le 22 novembre dernier, d'un immeuble vendu par le shérif, sur le Défendeur, et que le dit Stanley a depuis négligé de payer le prix de la dite adjudication, savoir, la somme de quinze cent cinquante livres, cours d'Halifax. La cour ordonne que le dit immeuble soit vendu de nouveau, à la folle enchère, aux risques et frais du dit Opposant Stanley, à moins que cause ne soit montrée au contraire, devant cette cour, le 26e jour de février prochain courant, à dix heures et demie du matin, cour tenante. La cour accorda la motion, et renvoya la motion, mais sans frais." (3 *J.*, p. 138.)

JOS. PAPIN, pour la Demanderesse.

BOVEY, pour l'Opposant.

SUBSTITUTION.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 10 mars 1857.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL and CARON, Justices.

CASTONGUAY, Appellant, *and* CASTONGUAY, Respondent.

Jugé: 1° Que, dans l'espèce, la donation au Demandeur contenait une substitution *fidéicommissaire.*

2° Que le tuteur à une substitution, poursuivi en cette capacité, représente tous les appelés à la substitution, dans le cas où tels appelés ne sont pas mentionnés nommément dans l'acte contenant la substitution. (1)

3° Que la clause dans la donation permettant l'aliénation des fonds, à constitution de rente, dans le cas où il serait, sur expertise, trouvé avantageux aux enfants du donataire, sera mise à exécution par la cour, sur rapport d'experts, dans une action par le donataire concluant à être autorisé à vendre, quoiqu'il n'eût aucun enfant, et qu'il ne fût pas probable qu'il en aurait.

This was an action brought by a donee, under a deed of donation to him, of the 14th May, 1827, from his mother, and was directed against a tutor to the substitution, to be allowed to sell, *à constitution de rente*, part of a large piece of land,

(1) V. art. 945 C. C.

lying within the city of Montreal. The pleas of Defendant were : 1° That the *appelés* to the substitution should have been brought into the cause, and that the tutor to the substitution could not legally represent individuals of full age, but only children unborn ; 2° That there was no allegation that Plaintiff had any children, but that, on the contrary, it was admitted he had none, and that, therefore, he could not be justified in demanding that *experts* should be named to report whether it was, or was not, advantageous to such children to be allowed to sell the property in question. The case was inscribed for hearing *en droit* on the exceptions, and, on the 28th November, 1845, the exceptions were dismissed, and the action held to be regularly brought, all the *appelés* being held to be represented by the tutor to the substitution. The case having been heard on the merits, the court below rendered judgment, on the 29 January, 1846. (Vallières, C. J., Rolland, Gale, Day, J.) " Considering that Plaintiff has proved his right of action, " ordered that *experts* be named to visit the premises and report " whether it would be advantageous to the children of Plaintiff, or to those who might afterwards be *appelés à recueillir la substitution*, to sell *à constitution de rente*." The following extracts from the donation had given rise to the question as to whether there was, in fact, a substitution, a point upon which some doubt was expressed in the court below, and upon which the opinion given by M. Justice Rolland principally referred : " Et la donatrice, désirant con-
" server aux enfants à naître en légitime mariage du dona-
" taire, seulement, la propriété pleine et entière des biens ci-des-
" sus désignés, sans l'étendre à un degré plus éloigné, veut et
" entend que les biens ci-dessus donnés en jouissance au
" donataire demeurent substitués, comme elle les substitue par
" ces présentes, aux enfants à naître en légitime mariage du
" donataire, seulement, auquel elle donne la propriété des dits
" biens, ce qui a été accepté pour eux par le donataire, leur
" père, voulant et entendant que ceux qui sont appelés à la
" présente substitution soient saisis des biens ainsi substitués,
" aussitôt que le cas de la substitution sera avenu, sans qu'ils
" soient obligés d'en faire demande en justice ; et, dans le cas
" de mort du donataire sans enfant, la jouissance et l'usufruit
" des biens à lui présentement donnés seront reversibles à ses
" frères et sœurs, ou à aucun d'eux, pour par eux en jouir leur
" vie durante ; et si, au décès du donataire sans enfants tous
" ses frères et sœurs étaient décédés, la propriété des dits biens
" retournera et appartiendra à leurs enfants nés et à naître,
" pour être partagés entre eux par souches. La présente dona-
" tion et substitution est ainsi faite, par la donatrice, parce que
" tel est son bon plaisir, et sa volonté ; et pour conserver la

" propriété des dits biens aux enfants du donataire, comme il " est dit plus haut, et, en outre, à la charge par le donataire " de payer à la donatrice, par chaque année, sa vie durante, à " compter de ce jour une somme de vingt-cinq livres cours " actuel, par forme de rente et pension alimentaire, payable, " &c. La présente donation est encore faite aux charges, " clauses et conditions ci-après exprimées, savoir : que le " donataire ne pourra transporter à aucune personne étran- " gère la jouissance et usufruit des dits biens pendant le " temps de sa jouissance, mais qu'il sera tenu d'en percevoir les " fruits et revenus pour son propre bénéfice et avantage, sans " pouvoir les dits fruits et revenus être saisis par aucun des " créanciers du donataire ; que le donataire pourra vendre, à " constitution de rente seulement, le tout ou partie du terrain " complanté *d'arbres fruitiers* désignés en ces présentes, si par " experts et gens à ce connaissants, cela est jugé avantageux " pour ses enfants, &c."

ROLLAND, Justice, on the hearing *en droit*, said : La cause étant inscrite sur les exceptions, la cour ne peut que les débouter, donnant pour motifs que l'action est régulièrement intentée contre le tuteur à la substitution, et que la naissance d'enfants au Demandeur, n'est point un fait nécessaire pour la présente demande. (1) Il en eût été autrement si le substitué était désigné par son nom, car alors il aurait fallu l'appeler, et, s'il était mineur, lui faire élire un tuteur, mais, dans le cas d'une substitution *fidéicommissaire*, comme la présente où la personne qui en profitera n'est pas connue, il faut un tuteur à la substitution. Rien n'empêche les intéressés d'intervenir, quoique n'ayant qu'un droit éventuel. Le Défendeur a été nommé tuteur à la substitution, en sorte qu'il n'est pas vrai de dire qu'il ne représente que des enfants à naître du Défendeur, comme il est allégué erreur dans les défenses. (2)

ROLLAND, Justice, upon rendering final judgment : Cet acte ne peut contenir qu'une *substitution*, car pour qu'il y eût une donation de la propriété, avec jouissance après la mort du Demandeur, supposé qu'il n'eût qu'un simple usufruit, il faudrait une acceptation, ce lui manque. L'on ne peut supposer que la donatrice voulait faire un acte qui ne pouvait avoir de suite, exprimant une volonté sans aucun but, ni efficacité, ce serait donc un usufruit avec rétention de la propriété. Mais référant aux termes de l'acte, on les trouve clairs et précis. C'est le langage ordinaire des substitutions et voici ce que dit Pothier : " La " principale règle est qu'on doit rechercher ce qu'a voulu l'au- " teur de la substitution, sans s'attacher aux termes." C'est en

(1) Thévenot, ch. 88.

(2) 5 Pothier, p. 508 ; Arrêts d'Augeard, p. 339 ; Arrêt du 14 août 1700.

conséquence de cette règle qu'il a été jugé, par arrêt du 16 juin 1719 rapporté au 7e tome du *Journal*, et par Augeard, que les termes dont se servent les notaires *ignorants* dans les substitutions, que celui qui en est grevé n'aura que l'usufruit des biens substitués, n'empêchent pas que le grevé ne dût être considéré comme propriétaire de ces biens et que le terme d'usufruit employé dans le testament doit s'entendre, non d'un usufruit proprement dit, mais d'un droit de propriété qui, au moyen de la substitution, devait s'étendre et se résoudre en la personne du grevé à sa mort, et qui, à cause du rapport avec l'usufruit qui s'éteint de même, avait été appelé usufruit. Thévenot, *Des Substitutions*, ch. 1 et 3, donnant les résultats de sa définition de la substitution *fidéicommissaire*, dans les paragraphes précédents, n° 18, dit : " Il en résulte qu'il faut qu'il y ait deux do-
" nations, deux libéralités faites par l'auteur de la disposition :
" l'une au profit de celui qui doit rendre ; et l'autre au profit de
" celui à qui l'on doit rendre." Au n° 19 : " Il s'ensuit encore que
" ces deux donations doivent être *successives ;* le second dona-
" taire ne devant recueillir qu'après le premier." Au n° 31 : " Fi-
" nalement il en résulte que celui qui est chargé de rendre n'a
" point en général la liberté indéfinie d'aliéner, &c." Au ch. XI. Termes par lesquels on peut substituer. N° 176. 1° " Point de termes marqués." N° 180. 2° " Il faut des termes dispositifs,
" et non simplement énonciatifs." N° 183. 3° " Peu importe
" que les termes soient impropres, s'il résulte suffisamment de
" la disposition qu'on a voulu substituer *fidéicommissaire-*
" *ment.*" N° 190. 4° " Il faut que les termes emportent trait de
" temps." N° 199. 5° Il faut que les termes emportent l'ordre
" successif." N° 206. 6° En explication. " Posons qu'il soit dit
" dans une donation entre vifs, *je donne à un tel*, et à ses enfants
" à naître, cela formera-t-il un *fidéicommis* en faveur des en-
" fants à naître ? Oui ; car le père étant saisi par la donation
" et les enfants ne pouvant l'être, parce qu'ils n'existent pas,
" il en résulte nécessairement l'ordre successif. N° 207. La pro-
" priété ne pouvant être en suspens, le père est le propriétaire
" de tout, à la charge de rendre à ses enfants s'il lui en sur-
" vient." N° 212. 7° Mots. " Je substitue, terme ordinaire, et
" après sa mort *je substitue.*" (1) Dans le cas actuel, le langage de la donatrice ne laisse aucun doute quant à l'intention de créer une substitution et un ordre successif. Il y est dit : " Je donne à mon fils la jouissance, et désirant conserver aux enfants à naître du donataire, seulement, la propriété pleine et entière du bien ci-dessus désigné, sans l'étendre à un degré plus éloigné, je veux et entends que les biens ci-dessus donnés en jouissance au donataire *demeurent substitués, comme je les*

(1) V. art. 928 C. C.

substitue par ces présentes, aux enfants *à naître*, auxquels je donne la propriété des dits biens, qui a été acceptée pour eux par le donataire, leur père, voulant et entendant que ceux qui sont appelés à la présente *substitution* soient saisis des biens ainsi substitués, aussitôt que le cas de la substitution sera avenu, &c." Voilà bien, ce semble, le langage de la substitution *fidéicommissaire*, v. 10 Ricard ; *Domat*, p. 199. Au n° 225. Thevenot observe que ce mot : *je substitue*, employé dans une donation entre vifs ne pouvait en général convenir qu'à la substitution *fiidéicommissaire*, et il ajoute au n° suivant : " En " effet, le premier gratifié étant *saisi*, il est clair que la subs- " titution ne peut alors trouver prise." Il est évident que, si la donation ne contenait pas une substitution, elle ne peut valoir comme donation de propriété aux enfants à naître, ni à d'autres qui ne sont pas parties acceptantes à l'acte. Ricard, *Tr. des donations*, p. 199. S'ils étaient deux qui fussent premiers donataires, comme dans le cas où l'usufruit est donné à l'un, et à l'autre la propriété, et qui dussent prendre la chose donnée par ses mains, l'acceptation de l'un ne profiterait pas à l'autre, et la donation quoique faite par un même acte, serait valable au profit de celui qui aurait accepté, et nul pour le regard de l'autre. L'on n'a pas prétendu ici que le Demandeur fût un simple usufruitier, si c'était le cas, et qu'il n'y eût pas de substitution, tout le bien, à la mort de la mère donatrice, pouvait bien retourner à la masse ; certes,cela changerait bien la position des enfants, et les frères et sœurs du Demandeur n'ont n'ont guère compris leurs droits. Mais qu'est-ce qu'une donation entre vifs d'un usufruit à vie sans substitution ? L'on ne trouve cela nulle part, si c'est donation entre vifs la propriété a dû, ce semble, être donnée. Si elle n'a pas passé au donataire, quel effet aura la donation après le décès du donateur ? Or, évidemment personne ne peut profiter de cette donation que la partie acceptante. Elle est caduque, quant aux enfants à naître ou aux frères et sœurs du donataire, à moins d'une substitution en ordre successif. *La propriété ne peut pas être en suspens*, elle serait donc demeurée à la donatrice. Or, que s'ensuit-il ? C'est que l'usufruit ne peut durer que le temps de sa vie. Car aussitôt sa mort, la propriété passe à ses héritiers, et l'on ne peut pas, je crois, prétendre que la donation d'usufruit aurait un effet au-delà de son décès, puisqu'elle n'a pas les formalités du testament pour la validité des dispositions à cause de mort. Tout le monde sait qu'un bien substitué peut se vendre quelquefois, pour des causes utiles, et, généralement, pour des causes nécessaires, lorsque celui qui a créé la substitution n'a pas déclaré quels seraient les cas où les immeubles pourraient s'aliéner. Mais, quand le donateur a exprimé sa volonté, *il faut la suivre*, et je ne connais aucune différence entre

les legs et les donations à cet égard. Les legs ne sont que des donations, et le donateur peut mettre toutes les conditions à sa libéralité. La seule question serait de savoir, admettant qu'il y ait substitution, *si c'est ici le cas voulu par la mère du donateur?* Nous avons déjà jugé la question par notre interlocutoire, et s'il ne s'agissait que de constater un fait, l'utilité de la vente, le rapport d'experts l'établit. La seule objection qui ait été faite par le Défendeur, est le défaut d'enfants, et l'improbabilité qu'il en naîtra. Mais comme cette objection n'est soutenue d'aucune autorité, nous en avons disposé, et je ne vois aucune raison d'en dévier. Je crois apercevoir quelque chose de favorable dans cette demande. C'est l'intention présumée d'une mère que son fils eût une vraie jouissance de ses biens, cela pour sa subsistance, sa vie durante. Il est le premier gratifié. C'est lui que la donatrice a préféré. C'est pourquoi prévoyant que ces biens (un verger en particulier) pourraient ne donner aucun revenu, elle a dû permettre l'aliénation, mais on dit qu'elle ne l'a voulu que pour *l'avantage de ses petits enfants.* Mais n'est-il donc pas de l'avantage des enfants de son fils, que leur père ne soit pas dans l'indigence, et qu'il puisse leur laisser une succession. Si la jouissance des biens substitués ne lui profite pas, tandis que, en les vendant, ils produiraient des revenus considérables, sans que le fonds diminuât (puisqu'il est question d'assurer les capitaux), le père ne pourra-t-il pas s'enrichir et les enfants profiter? Il paraîtrait que le Demandeur n'a point d'enfants, l'on dit même qu'il est probable qu'il n'en aura jamais, et c'est dans l'intérêt des parents *collatéraux* que l'on voudrait que le fils de la donatrice n'ait qu'une jouissance *nominale sans profits,* afin que ce bien qui est susceptible d'augmenter de valeur (étant dans l'enceinte d'une ville) demeure aux soins du grevé, et qu'il le leur conserve sans en retirer lui-même aucun revenu. Telle n'était pas suivant moi l'intention de la mère donatrice. Pour résumer, je trouve qu'il y a *substitution,* et que le Demandeur est le grevé, chargé de rendre les biens à sa mort à ceux que sa mère lui a substitués. Je ne puis concevoir l'idée d'un usufruit simple, par donation entre vifs, sans aliénation de la propriété. Et les termes de l'acte (où le mot *usufruit* ne se trouve même pas) me semblent rencontrer tout ce que les auteurs ont dit de la manière dont on crée une substitution *fidéicommissaire.* Quant à l'objection tirée de ce qu'on ne doit aliéner les biens substitués que dans certains cas voulus par la loi, cela n'a aucune application au cas actuel. Il est une autre règle; Thévenot, c. 48, p. 255, 1, n° 787, se fait cette question: " Est-il de l'essence de la substitution *fidéicom-* " *missaire,* que le grevé n'ait pas liberté indéfinie d'aliéner?" Et il répond: " Non, le substituant peut permettre l'aliéna- " tion *indéfinie.* Une substitution qui contiendrait cette clause

" serait valable." Voy. *Rép.*, vbo *Substitution*, sect. 9, p. 495. " La volonté de celui qui dispose est la loi suprême dans les " *fidéicommis.*" C'est aller plus loin qu'il ne faut, mais qui a jamais douté qu'un donateur (par donation entre vifs) comme un testateur, peut donner ou permettre l'aliénation des biens en certains cas qu'il définit, surtout lorsqu'il assure les fonds ou capitaux aux substitués ? Tous les jours, nous agissons d'après cette idée, que le testateur ou donateur peut mettre à sa libéralité telles conditions qu'il lui plaît. Et des légataires grevés ont été souvent autorisés à vendre suivant les directions du testateur ; ce n'est pas une doctrine nouvelle. Il ne s'agit donc que d'exécuter, dans le cas actuel, la volonté de la donatrice. Je n'ai rien entendu à ce sujet qui puisse me faire croire que, par notre interlocutoire, nous avons donné une fausse interprétation à la donation et j'y persiste. Il n'est pas hors de propos de référer à une décision de cette cour, en avril 1844, sur la demande de Mme Barron, pour mettre en vente des biens dont elle n'était que l'usufruitière. Là, en refusant d'acquiescer à cette demande, la cour s'est expliquée, disant que le simple usufruitier ne pouvait pas se fonder sur la loi qui permet au grevé de vendre les biens substituées en certains cas, comme des immeubles qui dépérissent, des maisons caduques et à la réparation et reconstruction desquelles les biens substitués ne peuvent fournir. Rep., vbo *Sub.*, sec. 31, § 1, p, 527, 1 col.) Le grevé, comme propriétaire, ayant droit de jouir d'un bien productif, tandis que l'usufruitier n'a que la jouissance du bien tel qu'il est, et aucun droit dans le fonds qui est inaliénable dans son intérêt comme bien d'autrui. Et si je suis d'avis ici de permettre la vente, c'est parce que je considère le Demandeur propriétaire grevé de substitution, et que l'intérêt même du grevé est à considérer comme la première gratifié, surtout si c'est un enfant de la donatrice. La donatrice a voulu qu'on consultât l'intérêt des substitués, *à la bonne heure.* Et je trouve que l'aliénation proposée est aussi dans leur intérêt. Je constate le fait de la manière que la donatrice l'a voulu, par experts et gens à ce connaissants. Lacombe, *Jurisp. civile*, vbo *Substitution*, partie II, sect. 4, n° 5, p. 247. En quels cas, biens substitués peuvent être aliénés, p. 247, et peuvent être hypothéqués. 2 Prudhon, des *Droits d'usufruit*, n° 516.

JUDGMENT IN APPEAL : " Considering that in the judgment appeal from there is no error, the court doth confirm the same." (14 *D. T. B. C.*, p. 308.)

GIARD, for Appellant.

CHERRIER, DORION and DORION, for Respondent.

SUBSTITUTION.—ACCROISSEMENT.

SUPERIOR COURT, Montreal, 30th March, 1859.

Coram SMITH, J.

JOSEPH *vs.* CASTONGUAY et al.

Held : That *accroissement* takes place in the donation of a usufruct, even by *acte entre vifs*, if such deed, by its disposition and by its clear expression, create a substitution *réciproque ;* that the substitution created by a donation and by a will are in this respect regulated by the same rules of law.

This was an action *en partage*, brought by the representatives of the heirs of Jean-Baptiste Castonguay. On the 15th May, 1827, Marie Josephte St-Germain Gauthier, widow of Jean-Baptiste Castonguay (father of the one before mentioned), " desirant se démettre en son vivant " in favor of her daughter, Julie Castonguay, of a certain house and premises, by deed of donation, " entre vifs et irrévocable," gave to said Julie Castonguay the " jouissance et usufruit, sa vie durante, d'un emplacement en cette ville, rue Capitale," &c. The deed then went on to say that the " donatrice désirant conserver aux enfants à naître en légitime mariage à la dite donataire seulement, la propriété pleine et entière de l'emplacement ci-dessus désigné, sans l'étendre à un degré plus éloigné, veut et entend que le dit emplacement et maison ci-dessus donnés en jouissance à la donataire, *demeurent substitués, comme elle les substitue* aux enfants à naître en légitime mariage de la donataire seulement, auxquels elle donne la propriété des dits biens, ce qui a été accepté pour eux par Luc Dufresne, leur père, et la donataire, leur mère," &c. Further on, the deed stipulates, that, " au cas de mort de la donataire, sans enfants, la jouissance et usufruit des dits emplacement et maison seront réversibles et appartiendront à ses frères et sœurs survivants, leur vie durante, et, si alors, tous les frères et sœurs de la donataire étaient décédés, la propriété du dit emplacement et maison appartiendra à leurs enfants nés et à naître en légitime mariage, pour être ensuite partagé entre eux par souche, que les enfants à naître de la donataire à elle *substitués*," &c. Julie Castonguay died without issue, but leaving two brothers and one sister (Jean-Baptiste Castonguay, first above named, François-Xavier Castonguay, and Mme Leclère, the two last named being Defendants in this case) surviving, and who all had possession and enjoyment of the house and premises together. On the 21st January, 1849, Jean-Baptiste, the younger, died, leaving six children, in whose rights Plaintiff is. Defendants having let the house in question to a new tenant, and from him collected the rent, and Plaintiff, being thus excluded from

his share thereof, brought his action *en partage*, and for his share of the profits.

RAMSAY, for Plaintiff, said : The principal question arises on the interpretation of the deed of the 15th May, 1827. That this deed was so badly drawn that it was impossible to apply to the technical expressions there used their strict and legal signification, as there was no possible interpretation of the deed throughout, by which the use of the words "*usufruit*" and "*substitution*" could be reconciled. It was, therefore, necessary to seek from the general terms of the deed the intention of the donor, and, on the part of Plaintiff, he contended : 1st. That, though the word "*usufruit*" was used in the clause of donation, it was quite evident that it was really the full property that was given, *grevé*, in favor of certain other parties, for the deed expressly states that the donor divested herself of the property. In favor of whom, then ? Not of the children, for they did not exist, and "*le néant ne peut avoir aucune propriété.*" (Vide Pothier, *Des Successions*, c. 11, sec. 2, art. 1er, p. 7, 4to.). Besides, by the terms of the deed, the children to be born are *substituted* to their mother. It cannot be pretended that they were substituted for the usufruct, for, independently of the rule of law just cited, such a clause is unnecessary. The usufruct of itself would follow the property on the death of the usufructuary. This interpretation equally applies to the disposition of the deed, in case Julie Castonguay should die without issue. The brothers and sisters surviving should each take their share *grevés* in favor of their children who were substituted to them. Or, if it be maintained that the deed of donation contained two conditions (a proposition which its terms do not altogether discourage), first, the death of Julie Castonguay without issue, but leaving brothers and sisters, second, her death leaving no brothers and sisters, but only nephews and nieces, the former of which really happened, then, it is unnecessary to embarrass the argument with the consideration of what the donor meant through the confused use of the words "*usufruit*" and "*substitution*," because Jean-Baptiste Castonguay, the younger, was the son of the donor, and one of her heirs, and also the heir of his sister Julie, and took, if not under the deed, at least by the common law, and the union of the usufruct conveyed to him by the deed of donation, at least under this reading of the deed, to the property to which he succeeded, destroyed the former by confusion, and he transmitted his third to his children, *auteurs* of Plaintiff. (Vide Répertoire, v° *Usufruit*, sect. 5, § 6, p. 407 ; An. Denisart, v° *Usufruit*, No 35 ; Lacombe, v° *Usufruit*, No 23.) 2nd. If the word *usufruit* were to prevail, and the use of the words *substitués* and *substi-*

tutions were to be explained away, it would avail Defendants nothing, unless they could show that the *droit d'accroissement*, operating in donations of usufructs by will but not in bequests of property, did not affect such a deed as this. It is a deed of donation *entre vifs et irrévocable*, and is so called by the parties to it, and not a will. The distinction to made between usufruct and property, as regards *accroissement*, is a pure subtlety, and ought to be restrained and not be applied to a new class of deeds. (Vide Ferrière, *Dic. de pratique*, v° *Accroissement ;* An. Denisart, v° *Accroissement*, No 18 ; N. Denisart, v° *Accroissement*, § 6, 2 ; Ricard, t. 1, p. 540 ; Tr. des *don. entre vifs ;* also Toullier, 3, No 448, and 5, No 699.)

DORION, A. A., for Defendants, said the dead of donation established a usufruct, first, in favor of Julie Castonguay, and, in case of her death without issue in favor of her brothers and sisters surviving her, *leur vie durante ;* that the shares, in such usufruct, of the brothers and sisters dying first, accrued *par droit d'accroissement* to the survivors, who had the right to enjoy the usufruct of the whole property, until the death of the one dying last. (Vide Pothier, *Tr. des don.*, sect., 106, § 3 ; Rép., v° Accroissement, p. 113, col. 1 ; Nouv. Den., v° Accroissement, § 5 ; Ricard, *Tr. des don.*, t. 1, p. 548.) Under the terms of the donation, no partage of the property could take place, until all the brothers and sisters were dead. Plaintiff demanded a partage, as representing the heirs of Jean-Baptiste Castonguay, the younger, while the children of Jean-Baptiste Castonguay, whose rights he had acquired, had all renounced to the estate of their father.

RAMSAY, in reply, said, that, even if it were proved that Plaintiff's *auteurs* had renounced, their renunciation still came too late, as they had previously taken possession of the property, and were in possession of it when Plaintiff purchased, and that this was an *acte d'héritier* which invalidated any subsequent renunciation. Vide Pothier, *Tr. des substitutions*, sect., 6, art. 2, § 1, p. 559, 4to. Besides that, as far as regards three of Plaintiff's *auteurs*, there was no proof of the authorisation of the agent who pretended to renounce for them.

SMITH, J. : This is an action brought by Plaintiff, as the representative of the children of Jean-Baptiste Castonguay, to recover a share in certain real estate, in the city of Montreal, as proprietors, and for a partage thereof, and for a share of profits and rents, &c. The title of Plaintiff rests on a sale to him, by the children of Jean-Baptiste Castonguay, as the heirs of Jean-Baptiste Castonguay, and as claiming title, under a certain deed of donation, executed by Mme Saint-Germain, on the 15th day of May, 1827, by which deed, the children of

Jean-Baptiste Castonguay pretend that they are entitled to take the property, on the ground that the substitution created by the donation in favor of Jean-Baptiste Castonguay, his brothers and sisters, is of the property itself, and is that of *grevés* under the donation. This right of property was transmitted to the children (the *auteurs* of Plaintiff), as the heirs at law of Jean-Baptiste Castonguay. Defendants contest this action, on the ground, 1st, that no right of property whatever passed, unter the donation, to Jean-Baptiste Castonguay at all; that the right of Jean-Baptiste Castonguay was the right of a mere usufructuary, and that, as the *usufruit* was given to Jean-Baptiste Castonguay, and his brothers and sisters surviving Julie Castonguay, the share of Jean-Baptiste Castonguay in the *usufruit* accrued, *jure accrescendi*, to his brothers and sisters, and that the right of *usufruit* was still existing, at the time of the institution of the present action, and that the children of Jean-Baptiste Castonguay not being called under the donation to take the property (except in the case of Jean-Baptiste Castonguay and the brothers and sisters of Julie, the original usufructuary, dying without children, which is not the present case), are not otherwise called by the donation to take the property at all. The second exception sets up the same ground of defence, with the addition that, even if the children had any right of property, until the extinction of the *usufruit* to Jean-Baptiste Castonguay and his brothers and sisters, no right could vest within, and that the present action, even if founded in law, is premature. The third ground is, that, as the children of Jean-Baptiste Castonguay had renounced the succession of their father, what right even they might have had under the donation was lost by the renunciation, and that, consequently, the title of Plaintiff in that respect is bad. The title of Plaintiff, therefore, rests on the donation of the 15th of May, 1827, executed by Madame Saint-Germain. Plaintiff asserts that the donation to Julie Castonguay, the reversion of which, under the terms of the donation, is given to Jean-Baptiste Castonguay, is something more than a mere *usufruit*. That she is *grevée de substitution* in favor of her children, should she have any, and that, although it is qualified as a *usufruit*, it is, in point of law, a donation of the property itself, and that her brothers and sisters, taking the property, after her decease without children, are themselves *grevés* in favor of their own children, and that the substitution being created by a donation, and not by a will, and it having had its effect by the donees having possessed the property, and that a division was made among the donees of their respective shares, the share of each donee, on his decease, vested in his children, and, consequently, the title

was complete. It was also asserted, that, even supposing the donation to Julie, with reversion to her brothers and sisters, was that of a mere *usufruit*, yet as the *usufruit* had vested under the donation in Jean-Baptiste Castonguay and others, that it became a separate right in each, and, on the death of Jean-Baptiste Castonguay, his share of the *usufruit* became reunited to the property and vested in his children, as his heirs; and, in support and corroboration of this view, Plaintiff contended that, from the terms of the donation itself, it was the clear intention of the donor to grant the property itself to her children, burthened with a substitution in favor of the grand-children; for, if the donation involved simply a *droit d'usufruit* to Julie and her brothers and sisters after her, the donation is defective in this, that the property, after the decease of the brothers and sisters, is given to no one, and that it cannot be supposed that it was the intention of the donor to give a mere right of usufruct, without, at the same time, bestowing the property on some one, and that, from this alone, the intention of the donor is manifested, so as to show that it was the property itself, and not the mere enjoyment of it which was contemplated by the donor in making the deed. The first point to be determined in the settlement of this question, is to discover what the real intention of the donor was in making the donation in question, and what was in reality bestowed on the donees by the deed. On reference to the donation, it will be found that the intention was to create a mere usufructuary right in favor of Julie Castonguay. The words used by the donor appear to me to leave no doubt on this point. The donor expressly declares that she desires to give the enjoyment only to Julie, during her life time, for the *usufruit* is detached and separated from the property, and the *usufruit* alone is given to Julie, and the property in the same donation is given in express terms to her children, should she have any. The *usufruit* is accepted by Julie herself, and the donation of the property which was to take effect simultaneously with the donation of the *usufruit*, is given to the children born, or to be born, and accepted for them by Julie and her husband. Throughout the whole donation, the right of Julie is described as being a mere *usufruit*, and it is this mere right of *usufruit* which is given to the brothers and sisters of Julie. It is the reversion of this right alone which is given to the brothers and sisters. Now, if the language of the donor is to mean anything, it says the enjoyment is given to Julie and the property is given to another. The property could not vest in two separate individuals at one and the same time. In vesting the property in the children, Julie was necessarily excluded from it, and it cannot be

supposed that, in giving the property to the children, it was the intention of the donor to use terms in giving the *usufruit* to Julie which would have changed the character of the donation, and which would have had the effect, in the very face of the clear and manifest intention of the donor, of vesting the property in Julie. The word *usufruit* is sometimes intended to mean the property itself, where from the terms of the whole act, this intention is apparent ; but, here, the reverse is the case. The *usufruit* is first separated from the right of property, and, at the very time, the *usufruit* is given the right of property is given also. Now, it cannot be presumed that this is an ordinary case of substitution in favor of the children of Julie to take after her death, for it is a direct donation of the property to the children of Julie, the *usufruit* having been first separated and detached from it, and a substitution of the right of *usufruit* alone created in favor of the brothers and sisters of Julie, in the event of her dying without children. There are other clauses in the deed which show that the intention of the donor was to grant only a life interest, for Julie is charged with the keeping of the property in repair, and certain other charges which clearly show to me that it was the intention of the donor to restrict the right of Julie to that of a mere usufructuary, and no more. This, then, being the right of Julie, the reversion of the right is given, after her death without children, to her brothers and sisters. It is clear to me that the right of Jean-Baptiste Castonguay, as one of her brothers, can be no more that what was given to Julie, under the terms of the donation; it could be no more, for it is the mere reversion of this right of Julie which is given to them. It was the *usufruit* which had been detached and separated from the property, which property, by the terms of the donation, vested in the children of Julie, if she had any, and this right could not be changed by the mere fact of Julie dying without any issue, and, even supposing that the gift of the property to the children of Julie to be born afterwards might be liable to doubt, there being no children alive to take the property, at the time it was given, it could never have the effect in law of converting a mere usufructuary right into a right of property, contrary to the clear and express terms of the donation. The *usufruit* was to go in one line, namely, the children of the donee, and the property in another line, namely, the grand-children, and the donation in favor of both took effect at one and the same moment. And, supposing that the children, as the heirs at law of the donor, might eventually take the property, at the termination of the *usufruit*, so far as the terms of the donation are concerned, they could not take the property as the heirs at law of their

father, Jean-Baptiste Castonguay, as he could not transmit to them any right of property whatsoever. The children of Jean-Baptiste Castonguay are only called by the donation to take the property in one case, viz., in case of the brothers and sisters of Julie dying before her, and she (Julie) dying without children. But, as this case did not happen, the children of Jean-Baptiste Castonguay could only claim property, under the donation, on the principle that their father, Jean-Baptiste Castonguay, was himself proprietor, and it is on this principle that this action is directed against the brothers and sisters of Jean-Baptiste Castonguay, as if they were all proprietors *par indivis*. Now, I think it is shown that he was not proprietor at all, but a mere usufructuary, and as such he could transmit in his succession no right of property whatever. The next point urged by Plaintiff is, that, as the *usufruit* was created by a donation and not by a will, that, after it had once vested in the usufructuaries, that it became a separate right, and, as no express mention was made in the donation to take the property so soon as the enjoyment of the share of Jean-Baptiste Castonguay so separated enjoyment from the others by separate enjoyment had lapsed, the share of Jean-Baptiste Castonguay again became reunited to the property and became vested in his heirs, and that the other joint usufructuaries could not claim this *usufruit* of the share of Jean-Baptiste Castonguay, *par droit d'accroissement*. This pretension rests on the presumption that Jean-Baptiste Castonguay was in reality *grevé de substitution*, and not a mere usufructuary. That, in this respect, a donation is different from al ast will, and that, in donations, the *droit d'accroissement* does not attach as it does when the right is given by will, and that, even if no such distinction existed, the right of Jean-Baptiste Castonguay having once vested in him, and he having enjoyed his right by a distribution with the other usufructuaries of the rents, issues, and profits of the immoveable estate, that the separation and division so made operated as a bar to any *droit d'accroissement*, which, in the absence of any such separation and division, might have otherwise attached. On this point, I am against Plaintiff. It is true that, in respect to the pretension as respects the *droit d'accroissement*, it does not usually exist in donations, as between the donor and the immediate donees, but, when a substitution of the *usufruit* is created by the donation, and to take effect after the decease of the original donee, then it seems to me that there is no distinction made in the law between substitution created by donation and those created by last will (see citations from Ricard and others), and that, when, even from the terms of the substitution, a contrary intention is not plainly manifested

therein, the law presumes that a *substitution réciproque* is created, and that there must be a termination to the *usufruit*, before it again becomes united to the right of property from which it had been originally separated and detached. Now, by the terms of this donation, it appears to me that there is created a *substitution réciproque*, in favor of the brothers and sisters of Julie, by which the survivor of them was to take and enjoy until the final termination of the substitution. The thing (that is, the *usufruit)* is given to the brothers and sisters conjointly; they are *conjoints* in the substitution of the enjoyment of this property, and also given to them *leur vie durante*, and as no one is called by the express terms of the donation to take the property in the event of the brothers and sisters succeeding to the *usufruit*, it (the property) can only be taken after the extinction of the *usufruit*. The mere fact that the brothers and sisters having enjoyed together the *usufruit*, and that they divided the rents, issues and profits among them, is not such a separate enjoyment as would create separate and independent rights in the usufructuaries, so as to vest in the heir at law to the property each part of the *usufruit* as it fell in. The usufruct, as a whole, passed, under the donation, to Jean-Baptiste Castonguay and the others, and it must terminate, as a whole, *jure non decrescendi*, before it can be again united to the property from which it had been originally separated. So long, therefore, as there are usufructuaries to enjoy, no property can vest in the heirs who may be entitled to claim after the termination of the *usufruit*. Assuming, therefore, that the right of Jean-Baptiste Castonguay, under the donation, was a mere *usufruit*, a life interest, and reversion of the right given to Julie; secondly, that he (Jean-Baptiste Castonguay) could transmit in his succession no right of property whatever to his children; thirdly, that the children are not specially called by the donation to take the property, except in one case, already explained, which did not happen; fourthly, that as no one is specially called to take the property after the *usufruit* passed to Jean-Baptiste Castonguay and the others; fifthly, that the heirs cannot claim any right in the property until after the final extinction of the *usufruit*, I am of opinion that the children of Jean-Baptiste Castonguay had no right of property, under the donation, which they could legally convey to Plaintiff, and that the action must be dismissed. Action dismissed. (3 *J.*, p. 141.)

T. K. RAMSAY, for Plaintiff.

CHERRIER, DORION and DORION, for Defendants.

SUBSTITUTION.—ACCROISSEMENT.

COURT OF QUEEN'S BENCH, Montreal, 5th September, 1861.

Coram Sir L. H. LAFONTAINE, Bart. C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., and MONDELET, A.-J.

JACOB HENRY JOSEPH, Plaintiff in the court below, Appellant, *and* FRANÇOIS-XAVIER CASTONGUAY, Defendant in the court below, Respondents.

Held: The words "*jouissance*," "*usufruit*," used in a donation, as describing the right intended to be conveyed to a donee, may be construed to mean the rights to be enjoyed by a person *grevée de substitution*, if the general purport of the deed of donation indicates the intention of the donor to create a substitution, and not merely to transfer to one person the *usufruit* and to another the *nue propriété*. (1)

2° That, in the case under consideration, subtitution was created by the deed of donation executed by the late widow Castonguay. (Herein reversing the judgment of the court below.)

3° That the usufruct actually created by the same deed of donation accrued to the surviving usufructuaries.

This case is reported supra p. 414.

MONDELET, J.: La cour de première instance a débouté l'action du Demandeur, qui demande la réformation de ce jugement. La question à décider, est de savoir si l'acte intitulé "donation," par Madame veuve Castonguay à trois de ses enfants, a transféré à sa fille, Julie Castonguay, la propriété d'un certain immeuble, et si cet immeuble a été substitué à ses enfants, et s'ils en devenaient les propriétaires. C'est là la prétention du Demandeur-Appelant, qui demande le partage de l'immeuble aux Défendeurs, se disant, lui Appelant, aux droits de ceux qui, tant par le dit acte, que comme héritiers de leur père, Jean-Baptiste Castonguay, sont devenus propriétaires pour 1/18e chacun dans cet immeuble. Les Intimés soutiennent que cet acte de donation de Madame veuve Castonguay, n'a conféré à Jean-Baptiste Castonguay, son fils, à défaut d'enfants de Julie Castonguay, aucun droit de propriété. Que, d'ailleurs, Jean-Baptiste Castonguay, eût-il acquis aucun droit de propriété dans cet immeuble, ses enfants ayant renoncé à sa succession, l'Appelant, par l'acquisition qu'il a faite de ces enfants de Jean-Baptiste Castonguay, n'a acquis aucun des droits qu'il réclame. Tout dépend, par conséquent, de l'interprétation de la clause de la donation du 15 mai 1827. La voici: "Dame St-Germain, veuve de feu Jean-Baptiste Castonguay, avec lequel elle était commune en biens et sa légataire universelle en pleine propriété: dans la vue d'exercer un acte de pure libéralité de sa part, envers Julie Castonguay, sa fille et sa présomptive héritière, auquel elle ne pouvait être contrainte en aucune manière,

(1) V. art. 928 C. P. C.

et désirant se démettre de son vivant, en sa faveur, des lots de terre et maisons ci-après désignés, pour la saisir par anticipation, et la rendre, par ce moyen, usufruitière actuelle des biens d'une succession dont elle n'avait que l'espérance, et rendre ses présomptifs héritiers, qui lui sont substitués par ces présentes, propriétaires actuels des dits biens ;" a reconnu avoir donné, par donation entre vifs et irrévocable, à la charge des substitutions, etc., ci-après exprimées, à Julie Castonguay, épouse de Luc Dufresne ;"... la jouissance et usufruit, sa vie durante, d'un emplacement, etc., provenant de la communauté de la donatrice avec feu son époux, que la donataire usufruitière a dit bien savoir et connaître ;... à commencer la jouissance du dit emplacement du premier courant, et ainsi continuer à l'avenir jusqu'à ce que l'usufruit constitué en sa faveur par ses présentes soit éteint et fini. Et la donatrice, désirant conserver aux enfants à naître en légitime mariage de la donataire seulement, la propriété pleine et entière de l'emplacement ci-dessus désigné, sans l'étendre à un degré plus éloigné, veut et entend que le dit emplacement et maison ci-dessus donné en jouissance à la donataire demeure substitué, comme elle le substitue par ces présentes, aux enfants à naître en légitime mariage de la donataire seulement, auxquels elle donne la propriété du dit bien, ce qui a été accepté pour eux par Luc Dufresne, leur père, et la donataire leur mère.... " Voulant et entendant que ceux " qui sont appelés à la présente substitution, soient saisis des " biens ainsi substitués, aussitôt que le cas de la substitution " sera avenu, sans qu'ils soient obligés d'en faire demande en " justice." La présente donation ainsi faite par la donatrice... *pour conserver la propriété du dit emplacement aux enfants de la donataire....* " Et au cas de mort de la donataire sans " enfants, la jouissance et usufruit des dits emplacement et " maison seront réversibles et appartiendront à ses frères et " sœurs survivants, leur vie durante. Et si alors tous les frères " et sœurs de la donataire étaient décédés, la propriété du dit " emplacement et maison appartiendra à leurs enfants nés et " à naître en légitime mariage, pour être ensuite partagée " entr'eux par souche. Que les enfants à naître de la donataire, " à elle substitués, ne pourront demander à faire entre eux le " partage de l'emplacement et maison présentement donnés " qu'après le décès de tous leurs oncles et tantes. Et sous toutes " les charges, clauses et conditions plus haut mentionnées, la " donatrice a transporté à la donataire tous droits de jouissance " qu'elle peut avoir dans l'emplacement et maison présentement " donnés, et à ses enfants à naître en légitime mariage tous " droits de propriété qui peuvent lui appartenir dans le susdit " bien, s'en dessaisissant à leur profit pour les en faire jouir " et mettre en possession, ainsi qu'il appartiendra."

Il me paraît que Madame Castonguay avait en vue d'effectuer quatre objets.

1° Se démettre, de son vivant, en faveur de sa fille Julie, sa présomptive héritière, de l'immeuble en question; 2° de l'en saisir par anticipation; 3° la rendre usufruitière actuelle des biens d'une succession dont elle n'avait que l'espérance; 4° rendre ses présomptifs héritiers, qu'elle leur substitue, propriétaires actuels.

Il est vrai que, de temps à autre, on rencontre les termes "usufruit," "usufruitiers", mais il me semble que le cachet de la substitution est imprimé bien visiblement à cet acte. Ne lit-on pas que la donatrice exprime sa volonté que cette substitution ne sera pas étendue à un degré plus éloigné? N'y est-il pas dit que cet emplacement et maison ci-dessus donnés en jouissance à la donataire, demeurent substitués, comme elle les substitue par ces présentes, aux enfants à naître en légitime mariage de la dite donataire? Plus loin, ne rencontre-t-on pas les termes suivants? "Voulant et entendant que ceux qui sont appelés à la présente substitution soient saisis des biens ainsi substitués, aussitôt que le cas de la substitution sera avenu." On se cramponne aux termes "jouissance" et "usufruit," pour faire croire qu'il ne s'agit que de cela. Mais il était bien naturel que la donataire, qui avait clairement exprimé la volonté de saisir de cet immeubles, sa fille Julie, et de lui en assurer la jouissance durant sa vie, au cas où cette fille mourrait sans enfants, pourvût au cas où elle mourrait sans enfants, et, de suite, cette mère prévoyante tranche la difficulté, en disant que cette jouissance passerait, par droit de réversibilité, à ses frères et sœurs, leur vie durante, et la propriété à leurs enfants après leur décès, pour être partagés entre eux par souche. Il est certain que l'on doit plutôt chercher à découvrir l'intention de madame Castonguay, qui s'attache à quelques expressions isolées et parsemées, pour ainsi dire, dans un acte où l'intention et la volonté bien clairement exprimées de la donatrice, lui expriment le caractère de substitution. Si cette interprétation est exacte, alors l'action du Demandeur est bien fondée. Dans cette hypothèse, le jugement de la cour de première instance, qui est fondé sur ce que l'honorable Juge (Smith) qui l'a rendu, regarde comme une donation d'usufruit, et non de propriété à Julie Castonguay, est une erreur; il doit être, et j'opine qu'il soit infirmé.

Sir L. H. LaFontaine, Ch. J.: Madame veuve Castonguay a, le 15 mai 1857, fait une donation entre vifs à sa fille Julie Castonguay: Il s'agit d'interpréter cet acte. La même personne a fait dans le même temps des donations à trois autres de ses enfants, à la Défenderesse, Madame Leclerc (Josephte Castonguay), le 11 mai 1827, à Jean-Baptiste Castonguay, le

12 mai 1827, et à F.-X. Castonguay, le 14 mai 1827. Toutes ces donations disposent de terrains situés dans cette ville. Elles sont toutes semblables. On peut dire qu'elles contiennent, par anticipation, une disposition de la succession de la donatrice, au profit de ses enfants et petits-enfants. Y a-t-il substitution ? ou y a-t-il seulement donation de simple usufruit à une personne, et donation, en même temps, de la nue propriété à une autre ? Ou, encore, dans le cas de Julie Castonguay, celle-ci étant décédée sans enfants, y a-t-il absence de disposition portant sur la propriété de l'immeuble dont il s'agit en cette cause, et qui a fait l'objet de la donation du 15 mai 1827 ? Cette dernière question a été résolue dans l'affirmative par le jugement dont est appel. Il faut avouer que l'acte de donation semble présenter, à première vue, quelque confusion dans l'emploi qu'il fait des mots *jouissance, usufruit, substitution.* Mais il me semble résulter de toutes les clauses de l'acte, rapprochées les unes des autres, que l'intention de Madame Castonguay a été que la propriété et l'usufruit fûssent plus tard remis à ses petits enfants, d'abord, dans le cas actuel, aux enfants de ses deux fils, J.-Bte et F.-X., et de sa fille Josephte, et que, dans ce dernier cas, les petits-enfants partageassent par souche. Si telle a été l'intention de la donatrice, il y a eu substitution, et par conséquent *chargé de rendre*, qui est le trait caractéristique de la substitution. On lit, dans ce qu'on peut appeler le préambule de l'acte : " Désirant *se démettre* de son vivant en sa faveur (Julie Castonguay) des lots de terre et maisons ci-après désignés." .. la *démission* porte sur le tout, " pour la saisir par anticipation", la saisine porte également sur le tout, " et la rendre par ce moyen *usufruitière actuelle*," une personne grevée de substitution est nécessairement usufruitière, " des biens d'une succession dont elle n'avait que l'espérance." On voit qu'elle veut disposer pour toujours de ses biens en entier " et rendre ses *présomptifs héritiers* qui lui sont *substitués* par ces présentes, propriétaires actuels des dits biens." Elle dispose de ses biens en usufruit et en propriété. Elle n'en retient donc rien. Le mot *actuels*, ajouté à celui de *propriétaires* et considéré isolément, pourrait ne pas avoir été bien choisi, et c'est ce qui me semble avoir créé toute la difficulté, puisque l'on en conclut que la donatrice a, dès ce moment-là, dès le 15 mai, disposé d'une manière absolue, au profit de personnes autres que Julie Castonguay, de la propriété séparément, et comme détachée et distincte de l'usufruit. Mais on ne saurait donner ce sens au mot que je viens de citer, d'abord parce que, dans la même phrase, elle a déjà parlé de *substitution* au profit des héritiers présomptifs, et ensuite parce que, plus loin dans l'acte de donation, l'on trouve la clause suivante : " Voulant et entendant que ceux

qui sont *appelés à la présente substitution* soient saisis des biens *ainsi substitués* aussitôt que *le cas de la substitution sera avenu*, sans qu'ils soient obligés d'en faire demande en justice." Cette clause claire et précise contredit le sens que l'on veut, de la part des Intimés, donner au mot " actuels " rapporté plus haut, et démontre, au-delà de tout doute, que l'idée d'une donation absolue de la nue propriété, distincte et séparée de l'usufruit, n'est pas entrée dans l'esprit de la donatrice, que cette donation de la propriété était faite par voie de substitution, et qu'elle en devait suivre le cours, la *saisine* au profit des *appelés* devant avoir lieu " aussitôt que le cas de la substitution sera avenu." Julie Castonguay n'avait pas d'enfants lorsque la donation fut faite ; elle ne paraît pas en avoir jamais eus. Dans ce cas, les motifs " ses présomptifs héritiers " qui sont au préambule, pouvaient comprendre ses frères et sœurs, neveux et nièces, et le mot " actuels " le sens que les Intimés lui donnent, c'est de suite déclarer que ces collatéraux ont eu " la propriété actuelle " du moment de la confection de la donation, et, puisqu'ils l'ont ainsi eue, les enfants de Jean-Baptiste Castonguay pouvaient disposer de leurs parts en faveur du Demandeur. C'est, de la part des Intimés, attaquer le bien jugé d'un jugement que néanmoins ils défendent. Je recherche, comme c'est mon premier devoir de le faire, si l'intention de madame Castonguay a été que ces biens passassent, propriété et usufruit, à ses petits enfants, neveux et nièces de Julie Castonguay, dans le cas de mort de celle-ci sans enfants, et je la trouve, quant à l'immeuble dont il s'agit, dans le fait de la substitution dont il me paraît évident que Julie a été chargée, en premier lieu, en faveur de ses propres enfants (cas qui n'est pas arrivé), en deuxième lieu en faveur de ses frères et sœurs, et dans le fait que ces derniers devaient être chargés de substitution au profit des petits enfants de la donatrice, et, par conséquent, *chargés de leur rendre.* Il y a plus, je trouve cette intention formellement écrite dans l'acte de donation. Prévoyant le cas possible du prédécès de ses trois autres enfants, la donatrice dispose ainsi : " Si *alors* (c-à-d. au cas de mort de Julie Castonguay, sans enfants) tous les frères et sœurs de la donataire étaient décédés, la propriété du dit emplacement et maison appartiendra à leurs enfants nés et à naître en légitime mariage, pour être ensuite partagée entre eux par souche." Pour ma part, je crois que cette clause était inutile. Aussi me paraît-elle purement explétive. La donatrice, craignant peut-être que, dans ce cas, les petits-enfants venant seuls à recueillir l'immeuble donné à Julie, n'émissent la prétention de le recueillir par tête, a voulu faire disparaître toute prétention de la sorte, en ordonnant qu'ils partageraient par souche, c'est-à-dire,

que les enfants d'une branche, quoique plus nombreux que ceux d'une autre branche, ne prendraient néanmoins que la part que leur père ou mère aurait eue; nouvelle preuve de l'intention et de la volonté de la donatrice que ses propres enfants eussent une part, et partageassent également entre eux relativement à l'immeuble en question, et que la part, ainsi afférente à chacun d'eux, fût transmise à ses enfants. Le jugement attaqué a fait ici l'application de la règle ou du brocard, *inclusio unius negat de altero.* Je crois qu'il n'y avait pas lieu à cette application. Ne serait-il pas étrange que madame Castonguay eût pu avoir l'intention de ne donner la propriété à ses petits-enfants, neveux et nièces de sa fille Julie, que dans le cas où aucun de leurs père et mère n'auraient pas eu de fait l'usufruit? Cependant il est évident qu'elle voulait gratifier tous ses petits enfants; et justement parce que l'un des pères, dans un cas, ou la mère, dans l'autre, aurait eu la possession de l'usufruit, on en conclurait que les petits enfants n'ont dans l'acte de donation aucune disposition en leur faveur concernant l'immeuble en question. On prêterait ainsi gratuitement à la donatrice une intention contraire à celle que toute la teneur de sa donation fait apparaître. En interprétant l'acte comme contenant une substitution, je ne fais que ce que les Intimés ont déjà fait eux-mêmes. Peu de temps après que les actes de donation eurent été faits, ils les ont tous fait lire et publier en justice, parcequ'ils renfermaient substitution. Et, dans la cause de Leclère et autre contre Perrin, Défendeur, et Garceau, garant, jugée en cour de première instance, le 1er octobre 1856, lequel jugement a été confirmé par cette cour le 1er mars 1858, les Intimés ont soutenu fort et ferme que l'acte de donation fait à Jean-Baptiste Castonguay renfermait substitution. Or cet acte est entièrement semblable a celui dont il s'agit plus particulièrement en cette instance. Le nom du donataire et les terrains donnés seuls ne sont pas les mêmes. Il y a un autre point de la contestation à juger. Une disposition expresse de de l'acte de donation attribue la jouissance aux survivants des frères et sœurs de Julie Castonguay. Le jugement dont est appel reconnait qu'il y a là substitution. F.-X. Castonguay et madame Leclère ont droit au bénéfice de cette disposition comme étant les deux seuls survivants; et au décès de l'un d'eux, l'autre aura seul l'usufruit, sa vie durante. Mais comme il est évident que la donatrice n'a pas voulu qu'il y eût partage du vivant de ses enfants, je suis porté à dire que l'action est prématurée, bien que je reconnaisse le Demandeur comme ayant acquis un tiers de la propriété, c'est-à-dire le tiers qui a été dévolu aux enfants de Jean-Baptiste Castonguay.

JUGEMENT: " 1° considérant que par l'acte de donation

entre vifs du 15 mai 1827, dont il s'agit en cette cause, fait par Marie Josephte Saint-Germain dite Gauthier, veuve Castonguay, de l'immeuble désigné dans la déclaration Julie Castonguay est devenue propriétaire du dit immeuble, à charge de substitution, non seulement en ce qui regarde l'usufruit, mais encore en ce qui regarde la propriété; d'abord au profit de ses propres enfants, et au défaut de ceux-ci, au profit des enfants de ses deux frères, Jean-Baptiste et François-Xavier Castonguay, et de sa sœur Josephte Castonguay, dame Leclère, et que, ce dernier cas arrivant, la donatrice a expressément ordonné que le partage se fit par souche, ce qui prouve encore davantage que l'intention de la donatrice a été d'établir une substitution du dit immeuble au profit de ses enfants; 2° considérant que, de plus les frères et sœur de Julie Castonguay, les survivants, recueillaient eux-mêmes à charge de substitution au profit de leurs enfants respectivement; 3° considérant que Julie Castonguay est décédée sans enfants, et qu'à son décès, ses frères et sœurs survivants ont eu, par une disposition expresse du dit acte de de donation l'usufruit du dit immeuble, lequel usufruit, d'après la même disposition, doit passer aux survivants ou au dernier survivant des frères et sœur; 4° considérant que Jean-Baptiste Castonguay, qui avait survécu à sa sœur, Julie Castonguay, est depuis décédé, laissant des enfants, et que ces enfants, en vertu de la substitution, sont devenus propriétaires d'un tiers indivis dans le susdit immeuble, et qu'ils ont pu en disposer à leur gré, mais sans préjudice du droit d'usufruit qui appartient au dit François-Xavier Castonguay et à Josephte Castonguay, dame Leclère, et aux survivants de ces deux derniers; 5° considérant que le Demandeur-Appelant a valablement acquis la part des enfants du dit Jean-Baptiste Castonguay dans le dit immeuble, mais qu'il n'aura droit aux fruits et revenus des dites parts qu'à compter du jour du décès du survivant des dits François-Xavier Castonguay et Josephte Castonguay, dame Leclère, et que, pour cette raison, son action, en ce qu'elle a rapport aux fruits et revenus du passé, est mal fondée; 6° considérant que la dite action, en ce quelle demande le partage ou la licitation du dit immeuble est prématurée, la volonté de la donatrice étant qu'il n'y a pas de partage ou de licitation du vivant de ses propres enfants auxquels et au survivant desquels l'usufruit du dit immeuble est reservé; et ce, tant que durera le dit usufruit; infirme le jugement dont est appel, rendu le 31 mars 1859, par la Cour Supérieure siégant à Montréal; et cette cour, procédant a rendre le jugement que la Cour Supérieure aurait dû rendre, déboute le Demandeur-Appelant, de la demande des fruits et revenus du dit immeuble, et, tout en le

déclarant propriétaire d'un tiers indivis du dit immeuble, le déboute également de son action, en autant qu'elle tend à provoquer le partage ou la licitation du dit immeuble, attendu que, sous ce rapport, la dite action est prématurée. (8 *J.*, p. 62.)

ABBOTT and DORMAN, for Appellants.

R. LAFLAMME, Counsel.

CHERRIER, DORION and DORION, for Respondents.

CHEMINS.—CONTRAT.

SUPERIOR COURT, Montreal, 31st March, 1859.

Coram SMITH, J.

ANDERSON and al. *vs.* THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MONTREAL.

Held: That an undertaking to "open, level, form and make" certain streets and squares, in the city of Montreal, necessarily involved the making of side walks, but not the making of fences along the line of such streets, and around such squares and the repairing of the road-way.

This was an action instituted by Plaintiffs to determine the validity of a claim advanced by them against Defendants, for certain works performed by the former, under a deed of cession, to the latter of certain property in the city of Montreal; Plaintiffs having consented to advance and expend the outlay or money necessary for the "opening, levelling, forming and making" of certain streets and squares, which it was agreed should be made through the property ceded. Defendants contested three items of the claim, namely, a charge of £183 0s 8d for fencing the property ceded, £570 7s, for plank side walks to the streets, thus laid out, and £85 for various repairs to the road-way of these streets, on the ground that none of such items came under the denomination of, or was in any way legally involved in the "opening, levelling, forming and making" the streets and squares in question. The city surveyor, in office at the time the works were executed, attested that they were all done under his superintendence and supervision, and that, in his opinion, they all fell under the class of work specified. And his opinion in that respect, except as regards the fences, was corroborated by the evidence of two competent civil engineers who were examined as witnesses by Plaintiffs.

JUDGMENT: Considering that Plaintiffs have established, by legal and sufficient evidence, that, by deed of agreement, made and executed, at Montreal, before Ross and his colleague, public notaries, and bearing date at Montreal, the thirtieth day of November, 1842, by and between the representatives of Thomas Phillips and Defendants, it was agreed, that the

estate Phillips should cede gratuitously to Defendants the necessary amount of land, for the continuation through the property of the estate of Phillips, of Dorchester and St. Catherine streets; and, also, for the opening of a certain other streets intended to be run through said property of the estate Phillips, as pointed out in the agreement and, also, for the opening and making of certain squares in the line of the new street, and that it was further agreed, by and between the parties, that the estate Phillips should advance the money necessary for the opening, levelling, forming and making the continuation of the aforesaid streets, as well as the new streets and squares intended by the agreement; and, it was further agreed that the money, before that time, from the first day of May, for the purposes set forth in the said deed, and to be thereafter, for the said purposes, expended by said estate Phillips should be refunded out of the assessments to be levied and collected on properties situated or to be thereafter situated on the said streets, and that the said assessments should be specially and exclusively applied to the payment of the sum already expended for the purposes contemplated by the agreement, namely, in the opening, levelling, forming and making the said streets and squares, until final payment and satisfaction thereof; and, considering that Plaintiffs have established, by legal evidence, the agreement and the several stipulations above detailed, and that they have expended, under the provisions of the said agreement the sum of £2524 9 11, with interest on the sum of £2366 7 5, from the first day of November, 1844; and, further, considering that Defendants have, by their exception to this action fyled, admitted that the said sum so expended is correct, under the provisions of the said agreement to the extent of £1577 11 5 only, and have pleaded, by the said exception, that they are not liable to refund to Plaintiffs any further or greater sum, than the said sum of £1577 11 5 under the covenants agreements set forth by Plaintiffs in their said action; and that the items charged firstly, for fencing the said streets, and secondly, for making the wooden side-walks, and thirdly, for the repairs of the streets after they had been made, are not chargeable to Defendants, under the stipulations of the agreement; and, further, considering that Defendants have established that, under the provisions of the agreement, they cannot be held liable to pay and refund to Plaintiffs the amounts expended by Plaintiffs for the fencing of the ground so given by Plaintiffs, under the *don gratuit* contained in the agreement; and, for the repairing of the streets, after the said streets were made and completed, as agreed upon, the said two items of charge not falling within the provisions and stipulations of the agreement; and, further, considering that, in

the absence of any provision in the agreement for the fencing of the street, the parties to the agreement are liable in law to all the obligations subsisting between immediate and adjacent proprietors and, thereby, liable to erect the fences between their said several properties by common contribution; and, further, considering that, by the provisions of the agreement respecting the opening, levelling, forming and making the said streets, Defendants are bound and liable in law for the outlay incurred in the making of the side walks, as a necessary part and portion of the streets, according to the true intent and meaning of the agreement; and, further, considering that the side walks were so made under the superintendence of the city surveyor, for the time being, under the provisions of the agreement, and that the expenditure in that respect was approved of by Defendants; and, further, considering that, in respect of the other charges, for fencing and repairing the roads or streets, the city surveyor had no authority in law to bind Defendants, the said expenses not being justified under the terms of the agreement; and, further, considering that Defendants have fyled, with their exceptions, a statement of the assessment received by them amounting to the sum of £552 5 0 current money of this province, which statement is admitted by Plaintiffs to be just and correct, and that, by the terms of the agreement, the sums expended and stipulated to be repaid from the time that such streets were finished and accepted; it is considered and adjudged.... Judgment for Plaintiffs. (3 *J.*, p. 157.)

BETHUNE and DUNKIN, for Plaintiffs.

JOSEPH PAPIN, for Defendants.

SAISIE-ARRET.—TRANSPORT.

SUPERIOR COURT, Montreal, 30th December, 1858 and 26th February 1859.

Coram BADGLEY, J.

CHAPMAN *vs.* CLARKE, Cur., *and* THE UNITY LIFE INSURANCE ASSOCIATION, T. S.

Held: The judgment *validant* a *saisie-arrêt*, and ordering the T. S. to pay the Plaintiff, when served upon the T. S., operates as a *transport forcé*, and vests the debt due by the T. S. in the Plaintiff, to the exclusion of the creditors of the Defendant, even although he be insolvent. (1)

(1) V. art. 625 C. P. C.

This case was submitted for judgment on the declaration of the Tiers-Saisis, under the following circumstances, detailed in the declaration made by Reynolds, their agent at Montreal :

" That one Sutton, deceased, to whose estate Defendant was curator, effect an insurance upon his life, in Chatham, U. C., at an agency of the Company there ; that the requisite preliminary proofs had been furnished to the agency there, and had been transmitted to England, where the *chef-lieu* of the Company was ; amount of the policy was not payable there ; that the *Tiers-Saisis* doubted whether there was any service binding upon them, by the mere service of the writ of attachment, at their agency, in Montreal, or that there could be any judgment ordering them to pay the amount of the policy in Montreal."

CROSS, for Tiers-Saisis, argued that the doubt suggested by the declaration of Reynolds was well founded ; that, under the circumstances, there was no valid service upon the Company, and that there being no contract to pay Sutton in Montreal, there could be no judgment compelling the Company to do so.

ABBOTT, for Plaintiff, cited 22 Vict., ch. 6, § 3, to shew that the service, at any agency of the Company, brought it validly before the court and within its jurisdiction ; and argued that it could be compelled to pay here, under the circumstances detailed in the declaration.

BADGLEY, J. (30th Dec., 1859), rendered judgment declaring the service sufficient, and the attachment good and valid, and ordering *Tiers-Saisis* to pay Plaintiff the amount of his debt. A copy of this judgment was afterwards served on Tiers-Saisis, but, before the usual fifteen days expired, one Cubitt, a creditor of Sutton, gave notice to Plaintiff and *Tiers-Saisis* of an application for the allowance of an intervention, alleging the insolvency of Sutton's estate and concluding that the monies in the hands of Tiers-Saisis should be paid into court, to be distributed amongst the creditors *au marc la livre*. The petition was presented in vacation for allowance to a Judge in Chambers, who ordered it to be heard in term. Between this order and the subsequent argument, Plaintiff issued execution against Tiers-Saisis, who, thereupon, paid the debt and costs to the sheriff ; and the amount was handed to Plaintiff. On the 17th of February, the question of the allowance of the intervention coming up for argument.

BETHUNE, for Cubitt, urged that the estate of Sutton being insolvent, its assets became the property of its creditors, and should be divided equally among them ; that to give effect to the judgment in favor of Plaintiff would be contrary not only to the general spirit of the French law, as enunciated in the

Coutume de Paris, but also to the opinions of the text writers and to adjudged cases. *Grande Cout.*, vol. 2, p. 1377, n° 4 ; 1 Pigeau, 664; 2 Henrys, p. 313; Anc. Den., vo *Saisie-Arrêt*, p. 420, n°s 32 and 33.

ABBOTT, for Plaintiff, argued that the judgment *validant* the *saisie-arrêt* operated as a *transport forcé*, and conveyed the debt absolutely to Plaintiff. This is the opinion best supported by authority, and appears finally to have prevailed in France. There was a conflict upon the point under the old system, which partially extended to the new, but the weight of authority is now decidedly in its favor, not in consequence of any enactment or provision contained in the code, but as the result of principles drawn from the nature of the proceeding, 2 Berriat, Saint-Prix (citing two old arrêts), p. 523, note 3 ; 6 Bioche, 58, 59 ; 4 Carré and Chauveau, p. 639, Q. 1971 et seq. and 1983 ; Roger, pp. 370 et seq., is against it, but he stands alone, and the principles has been sanctioned and adopted as the jurisprudence here, which, if there be any doubt, should settle the question. *Masson* vs. *Choall* and the *Merchants Ins. Company*, *T. S.*, and *Brion*, Opposant. (5 *R. J. R. Q.*, p. 57.) But Plaintiff having been actually paid, all question must cease, as all writers agree that there can be no repetition. Roger, 382, § 646. The notice of the application to be allowed to intervene made no difference. 12 Vict., cap. 38, § 92; 16 Vict., cap. 194, § 22. But intervention is not the proper course. The Intervening Party should have taken his recourse by opposition *à fin de conserver*, for there can be no intervention except during the pendency of a cause. 3 Carré et Chauveau, 199, 214, Q. 1270. The cause is now finished and the present proceeding is in the nature of an execution. Roger, p. 2, n° 2.

BETHUNE, in reply, urged that the ancient jurisprudence which governed us, adopted universally the principle of the right of the creditors of an insolvent to share his estate amongst them, and that the judgment sought by Plaintiff would strike at the root of that principle. That the authorities cited on behalf of Plaintiff were from the modern law, and that they were based upon the fact that, in all the cases, they referred to, the judgment *validant* the *saisie-arrêt* had acquired the force of *chose jugée*, which was not the case here; the delay for appeal not having expired. That, as to the payment made subsequently to notice of intervention, it could have no effect, Plaintiff having proceeded, and the *Tiers-Saisis* paid, at their own risk. The statutes cited evidently applied only to interventions before judgment, which were frequently fyled for mere purposes of delay. The statutes were passed to remedy an abuse in that respect, and could not be held to apply to interventions of this description. That the mode

adopted of claiming a share of the monies seized by an intervention was correct, and was the precise mode mentioned in the authorities already cited.

BADGLEY, J. (26th February, 1859), rendered judgment for Plaintiff, and against the allowance of the intervention, chiefly on the ground that the point had been formally decided in that sense in *Masson* vs. *Choall.* (3 *J.*, p. 159.)

ABBOTT and BAKER, for Plaintiff.

CROSS and BANCROFT, for T. S.

BETHUNE and DUNKIN, for Intervening Party.

ASSURANCE.

SUPERIOR COURT, Montreal, 31st December, 1858.

Coram SMITH, J.

THOMAS et al., Assignees, *vs.* THE TIMES and BEACON FIRE ASSURANCE CO.

Held : That the condition of a policy imposing the penalty of a forfeiture of all remedy upon it, in the event of any fraudulent overcharge, is not comminatory, but will be carried out, if such overcharge be proved. (1)

Plaintiffs as representing one Dorval, claimed over £600, as a loss by fire to goods in a shop tenanted by Dorval. Defendants pleaded : 1. That no statement of loss had been furnished them ; and 2. That the whole of the damage caused to Dorval, by the fire in question, consisted in injury to certain goods, and did not exceed £32 10s., and that there was a fraudulent overcharge made in his claim, which, under the conditions of his policy, deprived him of all remedy upon it. Dorval had furnished Defendants with a statement which consisted merely in an extract from his books showing his stock in trade in May, 1857, his purchases up to February, 1858 (the date of the fire), and, deducting from those sums the amount of his sales, less his profit, and the amount remaining after the fire ; showing a balance which was entitled, " Balance which A. D. is entitled to claim from the Insurance Co.", without asserting, either directly or indirectly, that the goods represented by the so-called balance had been either destroyed or injured by the fire in question, and giving no detail of any goods whatever. It was proved that no goods were destroyed by the fire in question ; that the fire had only extended over the edges of two rows of shelves, representing only a small fraction of one side of the shop, the goods on which shelves had all been

(1) V. art. 2490 C. C.

inventoried and valued by persons employed by Defendants for the purpose ; that the damage to these goods was chiefly caused by water, and amounted to only about £32 ; that all the other goods in the shop were undisturbed on their shelves and uninjured : and it further appeared, that, assuming that the goods claimed for as destroyed, had been on those shelves (as none others were touched or approached by the fire), there must have been considerably more goods of all descriptions on those shelves, than in all the rest of the store put together, *exclusive* of the damaged goods taken off them, which it was proved were sufficient to fill them.

BELANGER, for Plaintiffs, urged that their case was made out in evidence; that it was possible to show exactly what goods they had before the fire, and unreasonable of Defendants to demand it of them. That their books proved the extent of their loss, and that such a mode of proof had been recognized as sufficient in the case of *Morison et al.* vs. *Several Insurance Companies.*

ABBOTT, for Defendants, insisted that the statement furnished to the Company was not a statement of loss by fire, but only a pretended balance of goods on hand at one time, over those in the possession of the claimant at another. If there had been an extensive conflagration, causing an absolute destruction of goods and rendering a statement in detail impossible, proof from regularly kept books would be allowed its weight ; but, in this case, where the fire had been put out by a platter full of water, there was no reason for refusing a statement. There was, therefore, no preliminary proof. (Hammond, p. 111). But, apart from that, there was here a gross and obviously fraudulent overcharge, which, under one of the conditions of the policy, caused its forfeiture. The evidence, as to the amount of the overcharge, was conclusive ; and nothing showed it more glaringly than the absurd result derived from the so-called statement itself, by comparing its enunciation of the amount of loss with the amount of goods remaining in the shop ; and placing those amounts in juxtaposition with the superficial contents of the scorched shelving, as compared with that which was untouched. This enormous discrepancy must be explained by Plaintiffs. It is sufficient for us to show that it exists, to cast the burden of explaining it upon Plaintiffs, and, if they fail to do so, their action must be dismissed. 1 Annual Louis Rep., p. 216 ; 1 Hennen's Digest, p. 750 ; Ellis, on Ins., p. 53, Am. ed., p. 15 of English ; *Reynier* vs. *La. Ins. Co.*, 12 Louisiana Rep., 336 ; *Marchesseau* vs. *Merchants' Ins. Co.*, 1 Rob., 438 : *Wightman* vs. *Western Ins. Co.*, 8 Rob., 442 ; Hammond, on Ins., p. 15.

SMITH, J., adopted the view of Defendants on both points, and dismissed Plaintiff's action. (3 *J.*, p. 162.)

BELANGER, for Plaintiffs.

ABBOTT and BAKER, for Defendants.

CESSION DE BIENS.—SAISIE-ARRET.

SUPERIOR COURT, Montreal, 31st March, 1859.

Coram BADGLEY, J,

MACFARLANE *vs.* DELISLE, *and* MACKENZIE et al., Garnishees.

Held: 1. That the limitation, in a deed of assignment, requiring a creditor who receives his proportion of the estate of an insolvent trader, to give a discharge in full, is inoperative as respects creditors not parties.

2. That where an assignee of an insolvent trader holds moneys in his hands belonging to the trader's estate, the court will order the assignee to pay them over to an attaching creditor not a party to the deed.

3. That where the declaration of a Garnishee does not fully disclose the facts of the case, Garnishee must pay the costs of the contestation.

BADGLEY, J.: In this case, Defendant, Delisle, became involved in his circumstances, and insolvent. He called his creditors together and asked delay, offering twenty shillings in the pound, in quarterly payments, or to allow his creditors to take stock, to the full amount of their debts at their option. Some creditors took the amount due them in goods from his stock, and some gave the delay. Plaintiff would do neither. Delisle found that he could not go on, after making payment to the extent of five shillings in the pound, and made an assignment of all his effects and assets, by deed to McKenzie and Whiteford, two of the Garnishees, making them trustees. Plaintiff did not think proper to become a party, but nearly all the creditors did. Schedules were annexed to the deed showing the stock in detail, as well as the debts due and the cash on hand, at the time of the assignment, amounting together to to some £4800. It would appear that Lovell, the other Garnishee, in contemplation of this assignment, had made an offer to the creditors, to take the stock at a valuation, and to pay to each creditor an amount proportionate to the amount of his claim. There was a condition in the deed that no creditor was to receive his proportion unless he gave an absolute discharge. Lovell took all the stock at ten shillings in the pound, realizing to the creditors ten shillings in the pound, and probably a little more. Plaintiff did not feel himself bound to accede to the conditions of the deed, nor would he, unless he were put upon the footing of those who had previously received five shillings in the pound. This would appear from the evidence.

The assignees very properly said that they were only trustees for the benefit of all the creditors, and refused to give Plaintiff any more than his share of the proceeds of the estate, as it came into their hands as assignees. This not being satisfactory to Plaintiff, he took out an attachment after judgment, in the hands of McKenzie, Whiteford and Lovell, the Garnishees, upon a judgment, he had previously obtained against Defendant. The Garnishees came up and severally declared that they had nothing in their hands of Defendant, and their declarations were contested, Plaintiff alleging fraud on their part. The Garnishees claimed the right to answer separately, and held that there should have been three separate contestations, but this point was overruled in appeal, the Appellate court holding that fraud if proved would make the Garnishees liable *in solido*. But no fraud has been proved. It is shown, on the contrary, that the best that could be done for the estate in the interest of the creditors generally was done, and that Lovell, one of the Garnishees, lost some £700 or £800 by his part in the matter. So far, therefore, as Lovell is concerned the contestation is dismissed, but without costs. As to the other Garnishees, McKenzie and Whiteford, it is shown that they had a sum kept back for Plaintiff, for his proportion, ten shillings in the pound on his claim, this sum they will now by the judgment of this court be justified in paying over to Plaintiff, and they are now ordered to do so, and, as it was not distinctly stated in their declarations, that this sum was held back for Plaintiff, they must pay the costs of the contestations. Judgment ordering the Garnishees to account and pay over to Plaintiff, the ratable proportion of Defendant's estate, and, in default thereof, condemning them, within 15 days of the service of a copy of the judgment, to pay the amount of the Plaintiff's debt with interest and costs. The court, also, awarding costs of the contestations against the Garnishees, McKenzie and Whiteford, jointly and severally. (3 *J.*, p. 163.)

CROSS and BANCROFT, for Plaintiff contesting.

A. and W. ROBERTSON, for Garnishees.

JUGEMENT DE DISTRIBUTION—CONTESTATION.

SUPERIOR COURT, Terrebonne, 13th February, 1859.

Coram BADGLEY, J.

PREVOST *vs.* DELESDERNIERS, *and* FROTHINGHAM, Opposant, contesting collocation of PREVOST.

Held : The contestation of a judgment of distribution will be permitted at any time before its homologation on cause being shewn and on payment of costs. (1)

Plaintiff was collocated in a *projet* of a judgment of distribution to the exclusion of Opposant. The period allowed for contesting it had passed, and a rule obtained for its homologation. Opposant moved to be permitted to fyle a contestation of Plaintiff's collocation, on the ground of an accidental delay in the transmission of their proposed contestation, which had made it too late.

ABBOTT, for Opposant, cited *Woodman* vs. *Letourneau*, and *Letourneau, suprà*, p. 347, and *Hubert* vs. *Lemieux*, and *Rapin*, Montreal, 28th Oct., 1858, in both of which an opposition was allowed to be fyled after preparation of the judgment of distribution.

PREVOST objected that the cause shewn was insufficient, and urged the great inconvenience and delay which would result if the contestation were now allowed.

BADGLEY, J., allowed the fyling of the contestation, on payment of costs by the attorney. The object to be attained in all such cases was justice for all parties, and a claimant demanding what he conceived himself to be entitled to had a right to be heard, notwithstanding any inadvertance of his attorney. In such cases, the court would inflict costs on the attorney, but could not overbalance substantial claims on the one hand, by any mere inconvenience on the other. Motion granted. (3 *J.*, p. 165.)

ABBOTT and BAKER, for Opposant.

PREVOST, for Plaintiff.

(1) V. art. 742 C. P. C.

BILLET PROMISSOIRE.

SUPERIOR COURT, Montreal, 12th November, 1858.

Coram BADGLEY, J., and a Special Jury.

WOOD et al. *vs.* SHAW.

Held: 1. A promissory note payable to the order of an Insurance Company, and given in payment of a premium of insurance, is negotiable.

2. A memorandum at the foot of the note indicating its consideration, does not limit its negotiability. (1)

3. The endorsement of such a note by the secretary of the Company, in that capacity, was sufficient to pass the title to the note to the Plaintiffs; an implied authority in him to do so, having been shown by proof of the ordinary course of business of the Company; that the directors had effected the arrangement with the Plaintiffs of which the transfer of the note formed part; and that the Company had received the consideration of such transfer.

4. A holder of negotiable paper as collateral security, before it became due, is not affected by any equities between the original parties.

5. An exchange of negotiable paper is sufficient to constitute each party to such exchange, a holder for value of the paper he receives.

This case was submitted to a special Jury, Hon. Mr. Justice BADGLEY presiding. His charge fully exhibits the facts, and the questions of law raised by them, and was as follows: This action is instituted by the indorsees and holders of Defendant's three promissory notes, payable to the order of the Atlas Mutual Insurance Company of New York, and is met in pleading by a variety of objections, alleging want of consideration for the notes by the Company, its want of legal capacity at the inception of the contracts for which the notes were given, its fraudulent character in formation and existence, its insolvency at date of the contracts, its fraudulent representations which led Defendant to contract with it, and the fraudulent and unauthorized transfer of the notes to Plaintiffs, without consideration, the whole with Plaintiffs' knowledge and with their participation in the alleged frauds. Defendant also alleges that the notes were given for premiums of insurance on certain of his named vessels, and sets off the premium paid by him for re-insurance of three vessels, and the amount of indemnity insured against the loss of the city of Montreal, one of them. The issue has been narrowed to two questions, upon which you will declare your verdict. Are Plaintiffs *bona fide* holders of the notes for a good consideration? and, second, as a consequence of your affirmative finding on the first, what is the amount of Defendant's indebtedness? The main and chief issue is involved in the first point, which in itself is a mixed question of law and fact. As the testimony

(1) V. S. du C. de 1859, 53 V., ch. 33, s. 82.

must be fresh in your recollection, it will be alluded to in its prominent parts only, and as illustrating the principles of law connected with the issue. You have, in the testimony, the fact that the Atlas Company was incorporated in 1842, but remained unorganized until 1852, when it went into operation, having perfected the requirements of the state law incorporating it. That the law did not require a monied or cash capital to be paid up, but *bona fide* subscription for insurance to the amount of 500,000 dollars, which were effected, and, in consequence, 300,000 dollars of premium notes were received by the company. These premium notes given by the stock subscribers were in advance for insurances to be effected, and formed the capital of the Company, and, at the same time, the subscribers' security for and to each other in the Mutual Company. Being so established, it commenced operations in 1852, and continued them uninterruptedly until March 1856, when it was suspended by the effect of an injunction. In the interval a very extensive business had been carried on. Policies had been issued covering risks, to the large extent of 8 or 9 millions of dollars, and losses had been liquidated and paid to the extent of two millions of dollars. It is for the Jury to determine whether, in this statement of the Company's establishment and affairs, the fraudulent and "bogus" character imputed to it by Defendant is correctly applicable to it. The testimony also showed that Defendant effected insurance with this company, through their agent in this city, on his three vessels, the City of Montreal, the City of Manchester and the Pride of Canada, by valued policies for the period of one year, and the several premiums were respectively settled by Defendant's promissory notes, payable to the order of the Company, at a year from date, each note having a memorandum at the foot of each of the name of the particular vessel insured, for premium of which the note was given. The notes now sued upon are proved to have been for the premiums of insurance upon the Pride of Canada and City of Montreal, the policies for which expired on the 20th and 24th of March respectively. The memorandum has been particularly noticed in the defence, as in itself tending to limit negotiability of the notes, and requires a passing remark. The mere mention of the particular subject insured, as a memorandum on the note, you need scarcely be informed, can only be for identification and assistance in the keeping of the account and the settlement of the loss of the particular subject, should it occur, and cannot, in law, serve to limit the negotiation of the note, in fact, it forms no part of the notes, and it would seem that it could have no other effect than to facilitate the adjustment of each particular loss, and that is altogether unconnected with the question

of the negotiability or non-negotiability of the notes themselves. It is likewise stated, in the evidence, that the Company, having occasion to raise funds for the purposes and exigencies of its business, made arrangements with Plaintiffs, through its finance committee, to raise 30,000 dollars, for four months, upon Plaintiffs' notes, and for which the latter were to be securred by a transfer, as collateral security, of Company's effects and assets, consisting of notes for premiums held by the Company, and which were transferred to Plaintiffs, to the amount of about 33,000 or 34,000 dollars, the excess being intended to secure the Plaintiffs for their advance. This excess has not been objected to; but among those notes so transferred were the three notes in suit in this cause, with others of a like description to complete the security. The evidence states that Plaintiffs' notes were discounted in due course by the Company, who received the proceeds and applied them to their own purposes, and that this mode of raising the required amount was adopted on account of the facility afforded by the known good standing and established credit of Plaintiffs, who were engaged on an extensive grocery business in New-York, rather than in discounting those effects, which being made by strangers, such as Defendant, and in favor of insurance companies, which were then generally in bad odor, would not be so easily available as the paper of Plaintiffs. The transaction in itself exhibits nothing in conflict with law. It will be for you to determine from the facts proved whether fraud exists or not in the transaction itself. It is proper here to revert to the point established by the law, that the subscribers' premium notes given in advance for insurance to be effected, were the security of those subscribers. They were so; but, even these were made transferable by the Company by the same law, and, by its provision in that respect, full validity and effect were given to their transfers; but the law had no reference to notes given for premiums on policies issued in the ordinary course of the Company's business transactions, as general insurers, because, in fact, these latter were the representatives of what are usually cash transactions. Now, from what fund, it may be asked, was the Company expected to meet its engagements and pay losses? Were the cash representatives to accumulate untouched at the banker's, and the subscribers be called upon to pay percentages upon their premium notes, instead of using the cash, and raising money upon the available paper in hand. Such a course does not seem reasonable, and, hence, the legislative provision authorizing the transfer of these subscription premium notes, has furnished Plaintiffs with a strong argument for the necessary application of the ordinary notes in hand, to meet the business requirements of

the Company, as all similar notes and securities of a like negotiable character received by commercial institutions in the way of their business, are, in like manner, usually applied and used. The notes in suit, on their face are payable to the order of the Company, and become negotiable from that fact, differing in that respect, from notes not payable to order, which, although assignable, are not so assignable as negotiable paper. The very purpose and object of the negotiability of such paper are contained in the promise or direction on its face to pay to order, which, immediately, renders it assignable to all the world by indorsement. Defendant has given to his notes to order a general currency by indorsement, and the law will not permit him to restrict or limit his liability. The transaction, then, such as proved, was carried into effect on the 4th September, 1855. Now, it is proper that you should satisfy your own minds of the position of the Company, at the date of the notes, in the spring of 1855, and, at the date of the transaction in question. It is in evidence that the Company had suffered losses in 1854 and 1855; that, common with the other insurance offices in New-York, the pressure had reached the Atlas also, but that it continued its business without interruption and was undoubtedly solvent; that, in November, 1855, the Company being desirous of increasing their subscribed stock or subscription notes, were induced to cause their affairs to be examined into by a committee whose scrutiny resulted in a reported surplus of 127,000 dollars; that, to remove all possible apprehensions, this report was submitted subsequently to a second committee, who struck off any possible doubtful amounts, and reported a surplus of 80,000 dollars; thereupon, confidence was such, that new subscriptions to the amount of 300,000 dollars were taken up, some of the directors paying, in additional notes to the amount of 6,250 dollars each; that Plaintiffs themselves paid in 2,750 dollars, in addition to their previous investments; and that every loss was promptly met and liquidated up to January 1856; that the Company continued business until March, 1856, when it was suspended by the injunction. These facts stated by Tracy, the secretary of the Company, a witness before you, have been corroborated by evidence of Hart, the Company's agent in Montreal, from 1854 until the suspension, in 1856. He says that the Company's transactions, in this city, were exceedingly extensive, and that all losses had been fully liquidated up to January, 1856. As matter of fact, it is for you to collect from the evidence the position of the Company, at the time referred to, and especially in the early part of September, when the transfer of the notes was made. As to the law of the matter, no legal presumption of fraud can be gathered

from them against the Company. Your appreciation of the evidence will enable you to characterize the transaction between Plaintiffs and the Company, and will also enable you to determine whether it was a fair business transaction, and whether Plaintiffs took the notes *bona fide* and for a good consideration. It is for you to pass upon the transaction referred to. But it is strongly urged that the notes were not in fact legally transferred to Plaintiffs, that their transfer by Tracy's indorsement was unauthorized, and pass no right to Plaintiffs against Defendant, the maker. Bearing in mind their negotiability, their having been assets and property of the Company, and their delivery to Plaintiffs, in fulfilment of the arrangement between them and the finance committee, by which the Company raised 30,000 dollars upon Plaintiffs' acceptance, the notes in hand shew that they were indorsed by Tracy, the secretary, and he has told you that he did so by the direction of the president, in fulfilment of a previous arrangement made by the finance committee, and with the knowledge of the directors and trustees of the Company; that he had frequently made such endorsements, under their sanction, and that they adopted his acts, which had never been sanctioned by them, and that, moreover, the funds received in consequence of the completion of the transaction had been received by the Company, with the knowledge of the directors. It would seem that, if the acts of the secretary were unauthorized, it was for the Company, or its receiver, to complain, and not Defendant; but it is proved that neither ever objected to the indorsement. In all the ordinary business transactions of individuals, they are necessarily their own principals, and, upon any dispute arising, a direct application made to them as principals settles the difficulty; but with corporations, their very nature and establishment require their affairs to be entrusted to and managed by agents, under various denominations, whether by special or by implied authority, because, as is well known, the presence of a large stock proprietary to carry, on their ordinary transactions from day to day is an utter impossibility. The Atlas Company had a finance committee for such operations; they had also directors, whilst the president and vice-president, with the secretary, acting under their direction and authority, were the executive and ministerials officers to carry on its general operations and business. The general principle of law regarding agents, is, that, whatever a man, acting for himself, may do by himself, he may do by his agent; and that every disqualification for contracting by the agent on his own account will not disqualify him from contracting as the agent of another, an agent being considered as a mere ins-

trument. The law, moreover, requires no particular form or mode of appointment to enable an agent to draw, accept, or endorse bills or notes, so as to discharge his principal. He may be specially appointed for the purpose, or may derive his power from some general or implied authority ; and it is recognized law that the subsequent recognition of an agent's act is equivalent to previous authority, provided the agent, when he acted, assumed to act as agent. In this case, the Secretary was duly appointed such by written resolution of the Board, as produced by him, had no special authority to indorse in general, has frequently indorsed such paper, and indorsed these notes by the special direction of the President, in fulfilment of the arrangment made by the finance committee, and with the knowledge of the directors, who notified and confirmed his acts and indorsements by raising and appropriating the funds from Plaintiffs' notes received by the Company, in exchange for the Company's assests endorsed by the secretary. Viewing this as an implied authority, the law declares that " an authority is often implied from circumstances, as if the agent has formerly been in the habit of drawing, accepting, or indorsing for his principal, and his principal has recognized his acts." " It may be admitted," says Chief Justice Tindal, " that an authority to draw does not import, in itself, an authority to indorse bills, but still the evidence of such authority to draw is not to be withheld from the Jury, when they are to determine, on the whole of the evidence, whether an authority to indorse existed or not." *Prescott* vs. *Flinn*, 9 Bing., 19 ; 2 Moo and R., 22 S. C. And, therefore from the fact that the confidential clerk had been accustomed to draw checks for them, that, in one instance, they had authorised him to indorse, and in two other instances had received money obtained by his endorsing their name, a jury was held warranted in inferring that the clerk had a general authority to indorse." Now this is the law as regards individuals, but it is said not to reach to corporations. Whatever may have been held, in the former times, in England, with respect to these bodies, it is the recognized law of this province and of the United States respecting them, as shewn in *Angell* and *Ames*, on corporations, that commercial corporations are considered as, and classed with, natural persons, in their ordinary transactions ; and the old rule of English law which held that a corporation could only contract by writing, under their common seal, maintained by force of particular circumstances in England, has yielded, and is now universally repudiated, and it is now settled, even there, as will be found in the case of *East London Water Works* vs. *Bayley*, in 4 Bing., 283, that, among its powers, is

that of issuing bills or notes enjoyed by a corporation incorporated for the purposes of trade, the very object of whose institution requires that they should exercise this incidental power. See also *Broughton* vs. *Manchester Water Works Company*, 3 B. and A. 1. From the abrogation of the rule, it follows that the publicly recognized officers of the institution must from the nature of things, be entrusted with the ordinary transactions, and, hence, the office of cashier of a bank enables that officer to carry on their operations without the concurrence of the directors. The very nature of the business requires that it should be so. The implied authority from the acquiescence and ratification of the officer's acts is equally powerful. If the act, the endorsement, were within the power of the Corporation, the law makes it fall within the law of ratification and confirmation universally applied to the conduct of those in the relation of principal and agent. This principle applies equally to corporations and to natural persons. As already observed, the latter are their own principals ; but for artificial bodies, such as corporations, they can only act by and through their officers, who, in one sense, are their agents, in another the corporations themselves. As to persons and things outside of the organization of a corporation, to all the world, besides its own members, the acts of its officers are its own acts. If the dealing be within the powers of the corporation, mere silence and acquiescence will be sufficient in many cases ; and, when the corporation receives the proceeds of a transaction done in their agent's name, and by his assumed authority, there exists the highest possible evidence of its approval. 1 Smith's Appeal Cases. N. Y. P. ; Byles, on *Bills*, pp. 23, 24.. The law, therefore, does not interfere to set aside such acts of agents, but, on the contrary, lends the sanction of its power to give effect to them by the ratification and confirmation of the implied authority. There only remains to observe, upon the claims of set-off made by the Defendant ; first, for re-insurance effected upon his vessels, and, second, for the indemnity from the loss of the City of Montreal. The policies for the City of Manchester and the Pride of Canada ran out in due course, and the notes given for their premiums were earned. From the evidence it will be seen that the re-insurance could have covered a very few days only of any of the Atlas policies issued to Defendant, in fact, only 17 or 18 days for the City of Manchester and the Pride of Canada, and about 35 days for the City of Montreal. There would appear to be no doubt of the loss of this ship, which sailed from Liverpool, on the 3rd of April, 1856, and a part of her was picked up near Newfoundland, before the 20th of the same month. She never reached her port of destination, and the amount insured upon her was

6,000 dollars. Defendant claims to reckon the loss, from day of sailing, according to the law laid down in the French *Ordonnance de commerce*, which cannot be true as fact in all cases ; but the English and the American decisions concur in saying that there is no fixed rule as to the time after which a missing ship should be reported to be lost. It is in all cases a question of presumption for the Jury to be governed by the circumstance of each particular case. The authorities are *Kester* vs. *Jones*, Ky. and M., 333 ; *Cohen* vs. *Hinckley*. 2 Camp., 51, and others. It will be for the Jury, in this case, to satisfy themselves, from the evidence adduced, if they should deem it necessary to allow he claim for set-off. But, upon this point, it must be remarked that the notes sued upon were for the earned premiums on the Pride of Canada and the City of Manchester, not for that of the lost ship ; that they are in themselves substantially distinct contracts. It is also in evidence that the re-insurance indemnity on the lost ship was actually paid to Defendant after the loss had occurred, and previous to this action ; the promissory notes ran out with the policies bearing the same date. The notes sued on this case, however, matured before the policy for the insurance of the City of Montreal had run out. The loss would of course be a debt by the insurer to the insured ; but the authorities maintain a material distinction in effect between an indorsement before an after a bill or note becomes payable, namely, that an indorsement before the note becomes due passes to the indorsee a perfect title to sue upon the bill or note, wholly free from any claim the acceptor or maker have upon the indorser ; and that even if it becomes paid before it becomes due, and it is then endorsed over *bona fide*, for value, to another person, the indorsee may sue the acceptor upon it. 3 Camp., 124. If it be indorsed after due, the indorsee takes it, subject to all the objections and equities to which it was liable in the hands of the person from whom he received it ; and whatever would be a good defence to an action on it by the indorser, will be a good defence in an action by the indorsee. Where fraud or illegality is established, there is such a presumption of law, that there was no consideration that Plaintiff is bound to rebut it, because in such cases the law supposes that the original party, not being himself willing to sue upon the instrument has handed it over to another to sue upon it for his benefit. This presumption so raised by the law, must, as observed, be rebutted by the holder showing affirmatively that he gave value. You will determine by the evidence adduced if Plaintiffs have done so. The whole case, facts, and law are with you, for your consideration, and it will be for you to give verdict upon the two questions sub-

mitted, which will be handed to you in writing for your consideration. The jury found in accordance with the pretensions of Plaintiffs, upon both the questions submitted to them; and Plaintiffs having moved for judgment upon the verdict, in February term following, Defendant moved for a new trial before the same judge.

MONK, Q. C., for Defendant, urged that the charge was erroneous, in holding that the notes in question were negotiable.

ABBOTT, for Plaintiff, supported the charge of the judge in that respect.

And on last day of term, His Honor declared, that, having given the case his best consideration, he was unable to conclude that he had, in any respect, erred in his directions to the jury, and that the motion must be dismissed. Judgment for Plaintiffs. (3 *J.*, p. 169.)

ABBOTT and BAKER, for Plaintiffs.

ROSE and MONK, for Defendant.

The following authorities were cited for Plaintiffs: As to the negotiability of the notes: Revised Statutes of New-York, p. 593; 1 Comstock, 371; 4 Comstock, 51; Byles, 49; 4 Bingham, 283; 1 Smith's *Rep.* 47; 1 Smith's *Leading cases*, 448. As to authority of secretary of corporation to endorse; Dunlop's Paley, 155, 6, note 1; Story, on agency, § 50, 52, 53. As to implied ratification by accepting the benefit derived from the transaction otherwise; *Angell* and *Ames*, 267, 8, 9; *Curtis* vs. *Leavitt*, 1 Smith's *Rep.*, 47, 137; *Emmett* vs. *Read*, 4 Selden, 312; *Howland* vs. *Myer*, 3 Comstock, 290.

The Defendant's counsel cited the following to show that in the absence of precise evidence as to when a vessel was lost, the day she was last heard of is taken as the date of loss; 2 Arnould, *on insurance*, 796; Pothier, *Assurance*, n° 122.

PROMESSE DE VENTE.

COUR DU BANC DE LA REINE, EN APPEL, Montréal, 3 mai 1859.

Coram Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, J., DUVAL, J., et MEREDITH, J.

PINSONNEAULT (Demandeur en première instance), Appelant, et DUBÉ (Défendeur en première instance), Intimé.

Jugé: Que la promesse de vente (qui vaut vente) quoique verbale est obligatoire. (1)

LAFONTAINE, Juge-en-Chef: Le Demandeur allègue, dans sa déclaration, que le 1er mai 1855, il avait loué au Défendeur les terrains dont il s'agit, par *convention verbale*, pour une année, à compter du 1er mai 1855, à raison de £20 de loyer; qu'il avait été, de plus, convenu entre le Défendeur et lui, qu'à

(1) V. art. 1478 C. C.

l'expiration de la dite année, il vendrait au Défendeur, et ce dernier achèterait les susdits terrains, pour le prix de $1000, dont $500 seraient payables comptant, et $500 un an après; que le Défendeur était, le 1er mai 1855, entré en possession des dits immeubles, en vertu du dit bail et promesse de vente verbale; que le Défendeur n'ayant pas, à l'expiration de l'année du bail, le 1er mai 1856, ni depuis, rempli les conditions de la promesse de vente, et payé au Demandeur la somme de $500, le bail aurait été continué par tacite reconduction pour une autre année expirée le 1er mai 1857. Puis, le Demandeur concluait à ce que le Défendeur fût assigné à comparaître, pour voir dire et déclarer qu'il était déchu du droit d'acheter en vertu de la dite promesse de vente, et que le Défendeur fût condamné à remettre au Demandeur, sous quinze jours du jugement à intervenir, la jouissance et possession des lieux avec, en outre, les fruits et revenus depuis son injuste détention. Le Défendeur répondait que, dans le cours du mois d'avril 1855, il avait acheté de l'Appelant, par convention verbale, les terrains en question, et que l'Appelant s'était obligé de lui en passer titre valable, aussitôt qu'il en serait requis; que cette vente avait été faite pour le prix de $1000, dont $500 devaient être payés dans le cours de l'anné 1855, et le reste en quatre ans, par paiements annuels de $125, le premier desquels devait s'opérer en mars 1857; qu'en vertu de cette convention verbale, le Demandeur avait livré le dit emplacement, maison et bâtiments au Défendeur qui en avait pris possession en qualité de propriétaire, l'avait toujours occupé et l'occupait encore, sous la foi que le Demandeur lui donnerait un titre aussitôt qu'il en serait requis: " et qu'en prenant possession, le Défendeur avait payé comptant au Demandeur la somme de £50." Le Défendeur alléguait encore qu'au moyen de paiements subséquents, il avait bien et dûment acquitté la moitié du prix de vente; et, le 31 mars 1857, il lui a fait faire, par notaires, une sommation de lui passer titre le lendemain, et de venir ce jour-là chez le notaire pour y recevoir en même temps le paiement échéant dans le mois de mars. Quant aux paiements actuellement prouvés avoir été faits par le Défendeur, la preuve ne les a constatés que jusqu'à concurrence de la somme de $375, se composant de $200, payés en avril 1855, avant la prise de possession du Défendeur, de $75, payés en novembre de la même année, et de $100 payés en avril 1856. Ceci est admis par le Demandeur dans ses réponses sur faits et articles. C'est le premier mai 1855, que le Défendeur a pris possession. Le Demandeur le dit lui-même dans sa déclaration. Mais il ajoute que c'est " en vertu du bail et promesse de vente verbale." C'est invoquer deux titres qui se combattent mutuellement. Si c'est en vertu d'une promesse

de vente que le Défendeur possède, alors il possède *animo domini* pour lui-même, et non pour le Demandeur. Celui-ci le déclare formellement dans un des premiers chefs de sa déclaration, lorsqu'après avoir invoqué son propre titre d'acquisition du 2 mai 1854, il dit que ce titre a été " suivi de son exécution légale, qu'il a été dûment mis en possession, et qu'il a été ainsi en possession *jusqu'au 1er mai 1855.*" Il ne l'a donc pas été depuis; et, s'il a alors cessé d'avoir cette possession, c'est qu'elle a passé en d'autres mains, celles du Défendeur, non à titre de locataire, car, dans ce cas, le Défendeur n'eût eu que l'occupation, et la possession proprement dite eût continué d'être en la personne du Demandeur. Ainsi l'Appelant a invoqué, pour rendre compte de la possession du Défendeur à partir du 1er mai 1855, deux titres qui se contredisent. Que s'est-il réellement passé entre les parties ? Le Demandeur a allégué l'existence d'une promesse de vente, mais il déclare dans son factum qu'il n'en a pas fait la preuve. Il a aussi allégué un bail verbal qu'il n'a pas prouvé davantage. De son côté, le Défendeur dit qu'il y a eu réellement vente. De ce que le Demandeur n'a pas fait de preuve de sa promesse de vente, il ne s'ensuit pas que son assertion, dans sa déclaration, de l'existence de cette promesse, ne doive pas profiter au Défendeur, et lui venir en aide pour établir les énoncés de son exception, relatifs au fait d'une vente. Que l'on remarque que la promesse de vente que le Demandeur a invoquée, n'est pas une sorte de de promesse de vente, qui est unilatérale, la seule, comme le fait observer Troplong (1), dont se soit occupé Pothier dans le chapitre intitulé *Des promesses de vendre,* mais bien cette autre sorte de promesse qui est synallagmatique, par laquelle l'une des parties s'oblige à vendre, et l'autre à acheter, moyennant un prix convenu, de telle sorte qu'il ne reste plus qu'à passer acte de la vente ainsi préparée. (Troplong, n° 114). En effet, le Demandeur allègue, qu'il fut convenu que lui vendrait au Défendeur, et que celui-ci achèterait de lui les terrains en question. Il est vrai qu'il ajoute que la vente devait avoir lieu à l'expiration d'une année. Mais est-ce bien le cas ? N'y a-t-il pas eu au contraire vente parfaite et consommée du jour qu'il a eu livré la possession au Défendeur ? C'est dans les énoncés de la déclaration et dans les réponses du Demandeur sur faits et articles, qu'il faut chercher la preuve de ce qui s'est réellement passé entre les parties. Dans sa déclaration, le Demandeur reconnaît qu'il y a eu convention de vendre et d'acheter, que c'est après cela que le Défendeur a pris possession ; que le prix de la vente avait été fixé à $1000, ce dont convient le Défendeur. En répondant " oui " au second interrogatoire, sur

(1) *De la Vente*, n° 115.

faits et articles le Demandeur a admis dans les termes de cet interrogatoire que, " durant le mois d'avril 1855, ou vers le premier mai de la dite année, il était entré en marché avec le Défendeur de lui vendre " les terrains en question," et s'était rendu à cet effet à St Jean avec le Défendeur, chez Henry Tugault, avocat, dans le but de le consulter sur la manière de passer le contrat de vente." Il est vrai qu'en répondant au 3e interrogatoire, il ajoute : " La raison pour laquelle je suis allé avec le Défendeur chez monsieur Tugault, était pour savoir si le contrat au cas que la vente auraitlieu, pourrait être fait au nom de l'épouse du Défendeur, car ce dernier voulait que le contrat fût passé au nom de son épouse, et non au sien : monsieur Tugault a répondu que cela ne pouvait pas se faire." C'est avant de prendre possession, que le Défendeur paie au Demandeur $200. Ce dernier l'admet dans sa réponse au 11e interrogatoire : " Vers la fin du mois d'avril 1855," dit-il," le Défendeur m'a payé une somme de $200 comme garantie du loyer; car, sur cette somme, je devais me payer de mon loyer, pour le temps que le Défendeur occupait la maison et terrain, et le surplus ou la balance, je devais la remettre au Défendeur, lorsqu'il quitterait la maison et le terrain." Il est assez curieux de voir un locataire payer d'avance tout son loyer, mais il est encore plus curieux de voir ce locataire qui n'aurait tout au plus à payer qu'un loyer de £20 pour une année, mettre d'avance entre les mains du locateur, une somme de £50 pour *garantie* de ce même loyer ! Et, comme si cette *garantie* ne pouvait pas satisfaire le locateur, on le voit encore recevoir, dans le cours de la même année, une autre somme de £43 15s ! Et le Demandeur a la bonhomie, pour ne pas faire usage d'une autre expression, de nous dire que " cette somme ne reste pas entre ses mains comme payée en déduction des mille piastres, prix de vente des terrain et maison"! En répondant " oui " au 8e interrogatoire, il a admis, dans les termes de cet interrogatoire, que " c'était après avoir été avec le Défendeur chez Tugault, qu'il avait ainsi mis le Défendeur en possession" ; ce qui a ou lieu le 1er mai 1855, temps auquel lui le Demandeur admet, dans sa déclaration, avoir cessé d'avoir la possession. La promesse dont il s'agit a donc été suivie de tradition et de possession. Il y a eu consentement réciproque des deux parties sur la chose et sur le prix, prix dont une partie a été reçue par le Demandeur avant qu'il eût livré la chose, et une autre partie dans le cours de l'année qui a suivi cette livraison. En ce cas, il y a lieu à l'application de la vieille maxime, *la promesse de vente vaut vente*, maxime qui prévalait dans l'ancienne jurisprudence française et qui a été érigée en texte de loi par l'article 1589 du Code Napoléon, lequel porte : " la promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties

sur la chose et sur le prix." Le titre sur lequel repose la possession du Défendeur est cette vente, et elle seule. Il possède donc *animo domini*. Il ne peut donc être censé tenir ou occuper à titre de locataire, dans le sens de la 16e section du statut de 1855, chap. 108, dont il n'y a pas, par conséquent, lieu de lui faire l'application. Je suis donc d'opinion que le jugement de la cour de première instance doit être confirmé.

Le jugement de la Cour en Appel est comme suit: " La cour considérant qu'il résulte de la déclaration du Demandeur et de ses réponses aux interrogatoires sur faits et articles que le Défendeur a acquis le terrain en question en vertu d'une promesse de vente suivie de possession, et que c'est en vertu de cette promesse de vente, et non en vertu d'un bail à loyer, qu'il a cette possession; que le Demandeur n'a établi aucune cause de déchéance des droits acquis au Défendeur en vertu de la dite promesse de vente; que, par conséquent, dans le jugement qui déboute le Demandeur de son action il y a bien jugé, confirme le susdit jugement." (3 *J.*, p. 176.)

CARTIER. BERTHELOT et POMINVILLE, Avocats de l'Appelant.

CHERRIER, DORION et DORION, Avocats de l'Intimé.

LETTRE DE GARANTIE.

COUR SUPÉRIEURE, Montréal, 30 avril 1859.

Coram BADGLEY, J.

MASSON et al., *vs.* DESMARTEAU et al.

Jugé: Que le cautionnement, résultant d'une lettre de garantie, pour un montant limité, et pour un temps à être déterminé par sa révocation ultérieure, n'est pas éteint par le paiement d'un montant équivalent au montant cautionné, effectué par le débiteur sans imputation, lorsque la caution est solidaire.

Les Demandeurs poursuivent les Défendeurs, pour £100, étant le montant d'une lettre de crédit souscrite par les Défendeurs, en faveur de Louis Plamondon, et qui est comme suit: " Montreal, 25 September, 1855. Messrs. Masson, Bruyère, Thomas & Co., Gentlemen, please advance, sell and deliver to Louis Plamondon, of this City, from time to time, as he may require them, goods to what amount you please, and on such terms as may be agreed upon. And we hereby bind ourselves jointly and severally with him to the amount of one hundred pounds, and to pay the same on his neglecting to do so. This letter to remain in force until countermanded by us. Your obedient servants, (Signed) DESMARTEAU, PLAMONDON & MOUSSEAU. £100 0 0." Les Demandeurs alléguaient que, par cette lettre de crédit, les Défendeurs sont devenus obligés en-

vers eux, au paiement, jusqu'à concurrence de £100 pour toutes marchandises et effets vendus et livrés, sur et en vertu de la lettre de garantie au dit Louis Plamondon, et ce jusqu'à révocation d'icelle : que, depuis le 25 septembre 1855 au 9 juin 1857, ils ont vendu et livré sur et en vertu de la dite lettre de crédit, au dit Plamondon, divers effets, marchandises et articles de commerce, pour et au montant de £413 2s. 6d. sur lesquels Plamondon en a remis aux Demandeurs, pour un montant de £28 11s. 6d., laissant dû un montant de £384 11s. 2d. ; que, pour assurer aux Demandeurs le paiement de la dite somme de £384 11s. 2d. Louis Plamondon a, à différents temps, consenti en faveur des Demandeurs les divers billets promissoires mentionnés en la déclaration. A cette demande les Défendeurs plaidèrent : que les Défendeurs ont, le 17 juin 1857, notifié les Demandeurs qu'ils cesseraient, depuis et après ce jour-là, d'être responsables envers eux pour Louis Plamondon et ont alors révoqué la dite lettre ; que les Demandeurs ont accepté le susdit avis le 17 juin 1857, et ont, néanmoins, continué à avancer des marchandises au dit Plamondon, à leurs risques et périls après le dit jour, 17 juin 1857 ; que Plamondon a payé diverses sommes de deniers depuis le 17 juin 1857, jour de la révocation de la lettre se montant à une somme excédant £100, savoir £159 5s. ; que, partant, la somme ainsi payée par Plamondon doit, de plein droit, être imputée sur le montant garanti par la lettre de crédit, comme étant la dette que Plamondon avait le plus d'intérêt à acquitter. A cette défense, les Demandeurs ont répondu : que les sommes réclamées par eux, par la présente action, étaient toutes dues par Plamondon avant le 17 juin 1857, jour de la signification de la révocation de la lettre de crédit, et qu'ils ne poursuivent pas pour le prix de marchandises vendues et livrées au dit Louis Plamondon depuis la révocation de la lettre ; que, bien que Plamondon ait payé £159 5s., depuis la révocation de la lettre, les Défendeurs sont néanmoins tenus, aux termes et dans le sens de la lettre de crédit, au paiement du montant d'icelle en faveur des Demandeurs, qui sont créanciers de Plamondon, d'une somme beaucoup plus considérable, pour marchandises vendues et livrées avant la révocation de la lettre, les Défendeurs étant conjointement et solidairement obligés avec le débiteur jusqu'à concurrence de £100 ; que les Défendeurs n'ont pas le droit de demander que la somme de £159 5s., payée par Plamondon soit imputée à éteindre et payer le montant de la lettre de crédit.

POMINVILLE, pour les Demandeurs, prétendit que, par la lettre de garantie, les Défendeurs s'étaient obligés solidairement avec le débiteur et que, conséquemment, ils demeuraient toujours responsables des diverses sommes dues par le débi-

teur, et il cita : 2 *Pardessus*, p. 436, chap. 2, N° 586 ; 2 vol., *Droit commercial*, par Gouget et Mercier, vbo *Caution*, p. 77.

LAFRENAYE, pour les Défendeurs, prétendit que cette lettre de crédit avait été donnée en conformité aux dispositions du statut 1847, 10 et 11 Vict., cap. 11, sect. 7 : que le paiement de £159 5s., fait par le débiteur Plamondon, depuis la révocation de la lettre de crédit, sans aucune imputation avait eu l'effet d'anéantir le cautionnement des Défendeurs. Pothier, *Obligations*, N° 567, coroll. 5.

Le jugement condamne les Défendeurs au paiement de la somme demandée. (3 *J.*, p. 186.)

CARTIER, BERTHELOT et POMINVILLE, Avocats des Demandeurs.

LAFRENAYE et PAPIN, Avocats des Défendeurs.

INSCRIPTION EN FAUX.

COUR SUPÉRIEURE, Montréal, 28 février 1859.

Coram BADGLEY, J.

MARTINEAU *vs.* KARRIGAN.

Jugé : Qu'il n'est pas nécessaire de faire une élection de domicile dans une inscription en faux. (1)

La déclaration du Demandeur allègue : qu'en 1854, un nommé Blake fit son testament, léguant la terre en litige à B., qui la vendit au Demandeur, après le décès de Blake, qui mourut dans la même année, et sans avoir rien changé à son testament. A la mort de Blake, le Défendeur était en possession, comme locataire, de la dite terre, et ne voulut pas s'en désaisir ; de là, la présente action. L'action fut rapportée le 23 novembre 1857. Le 26 novembre 1857, le Défendeur produisit une exception dilatoire, portant qu'en juillet 1857, il a acheté de Michael Blake, frère du testateur, qui se prétend seul héritier du dit James Blake, la susdite terre, et, en conséquence, demanda délai pour appeler M. Blake comme son garant formel. Michael Blake n'a pas comparu. Le 20 mars 1858, le Défendeur fit motion pour s'inscrire en faux contre le testament de James Blake, et la copie d'icelui filée comme exhibit du Demandeur, la minute ayant été apportée au greffe et les moyens de faux produits ; le 19 février 1859, le Demandeur principal, Défendeur en faux, fit motion pour faire rejeter les moyens comme étant non pertinents et inadmissibles. Cette motion contenait huit moyens différents : 1° les

(1) V. art. 161 C. P. C.

inscriptions et moyens ne sont pas appuyés sur une autorisation spéciale, celle produite avec l'inscription étant de Martin Karrigan seulement, ce qui n'est pas la même personne que le Défendeur. (1) 2° L'inscription elle-même est faite au nom de Martin Karrigan, tandis que l'action principale porte Martin Karrigan *alias* Karrigan, fils. 3° Il n'y a aucune élection de domicile. (2) 4° Les moyens sont trop vagues et simplement négatifs. (3) 5° Les moyens attaquent non seulement la fausseté de l'acte, mais encore sa validité. 6° Les moyens attaquent l'acte, non seulement de fausseté, mais de falsification, et il n'y a aucune raison pour en soutenir la falsification. 7° L'acte argué de faux a été admis et reconnu pour vrai par le Défendeur. 8° L'acte argué de faux est vrai et sincère, et la dite inscription n'est faite que pour obtenir du délai. (4) La motion concluait à ce que le Demandeur en faux fût déchu de son droit d'inscription de faux, et que la dite inscription fût déclarée nulle, et les moyens impertinents et inadmissibles, et qu'il fût passé outre à l'instruction de l'action principale. Cette motion fut rejetée, le jugement ne se motivant que sur une raison d'insuffisance, sans autre détail.

" Considering the motion fyled by Plaintiff, Defendant *en faux*, and the reasons therein set forth, insufficient for the rejection of the inscription *en faux* of Defendant, Plaintiff *en faux ;* doth reject the said motion, and, adjudging upon the motion fyled by Defendant, Plaintiff *en faux*, doth maintain the same, and doth declare the *moyens de faux* by him fyled *relevant* and admissible, and doth order Plaintiff, Defendant *en faux*, to fyle his plea thereto, within eight days after the making of the *procès-verbal* descriptive of the exhibit fyled and *argué de faux* in this cause." (3 *J.*, p. 190.)

Ls. RICARD, Avocat du Demandeur.

McKAY and AUSTIN, Avocats du Défendeur.

(1) Pigeau, t. I, p. 409 ; Pothier, t. X, No 769 ; Code de procédure, art. 218 ; *Carré et Chauveau*, t. II, p. 398 ; Denisart, t. VIII, p. 486.

(2) Pothier, t. X, N° 769 ; Pigeau, t. I, p. 418, à la note ; *Carré et Chauveau*, t. II, pp. 415 et 416.

(3) Pigeau, t. I, p. 423 ; Nouveau Denisart, t. VIII, p. 479.

(4) *Carré et Chauveau*, t. II, p. 400.

LETTRE DE GARANTIE.

COUR DE CIRCUIT, Montréal, 17 décembre 1858.

Coram SMITH, J.

LEBLANC *vs.* ROUSSELLE.

Jugé : Que les paiements faits sans imputation par le débiteur, ont eu l'effet d'anéantir le cautionnement donné en sa faveur, en vertu d'une lettre de garantie (1) pour un montant limité.

Le Demandeur réclamait de la Défenderesse, en qualité de légataire universelle en usufruit de son mari, Marc-Antoine Primeau, la somme de £50, en vertu des allégués de sa déclaration, en substance comme suit : que, le premier août, 1857, Théophile Dumouchel fit son billet promissoire en faveur du Demandeur, par lequel, à trois mois de sa date, Dumouchel promit payer, pour valeur reçue, au Demandeur, ou à son ordre, la somme de £50, et le remit au Demandeur ; que Dumouchel est en faillite et en déconfiture, et est notoirement insolvable, et ce au vu et su de la Défenderesse ; que, le 26 mai 1856, Marc-Antoine Primeau consentit un écrit sous seing privé, comme suit : " G. Leblanc, Ste-Martine, 26 mai 1856. Monsieur, le porteur, M. T. Dumouchel, désirant ouvrir un magasin dans mon village, à Ste-Martine, je vous informe que je me rends caution pour lui, jusqu'au montant de £50, de marchandises, si toutefois vous voulez bien m'accepter, et ce suivant les termes de paiement que vous établirez avec lui. Ce faisant, vous obligerez votre très humble serviteur. M. A. Primeau ; "

Qu'en conséquence du dit écrit, le Demandeur fit des avances de marchandises à Dumouchel, suivant les termes de paiement établis entre eux, et par lesquels il fut bien entendu et stipulé entre ce dernier et le Demandeur que le cautionnement ainsi offert par Primeau, jusqu'à concurrence de cinquante livres, resterait valide pour les derniers £50 que Dumouchel pourrait devoir au Demandeur ; que le dit billet fut donné pour des marchandises ainsi vendues et livrées par le Demandeur à Dumouchel ; que la Défenderesse, sachant bien qu'elle est caution et redevable, jusqu'à concurrence de £50, envers le Demandeur pour Dumouchel, a retiré de ce dernier, avant sa faillite et sur la masse de ses biens qui devait être distribuée entre ses créanciers, des sommes d'argent et des valeurs considérables, pour se garantir et s'indemniser du susdit cautionnement ; que le Demandeur est créancier de Dumouchel pour un montant excédant la somme de £50. Les défenses sont en substance comme suit : que le Demandeur n'a jamais fait connaître au dit Primeau, s'il acceptait ou non cette offre de se porter caution de

(1) 10 et 11 Vict., cap. 11, sec. 7.

Dumouchel, et, qu'en loi, le fait que le Demandeur n'a point fait connaître sa détermination de l'accepter comme caution de Dumouchel, a libéré Primeau de toutes ses offres de garantie; que, depuis le 26 mai 1856 jusqu'au 19 juin 1857, le Demandeur a vendu et livré à Dumouchel des marchandises au montant de £187 8s. 7d. ou environ ; que la première vente de telles marchandises qui fut faite à Dumouchel le fut le 26 mai 1856, après que le Demandeur eut été mis en possession de la dite lettre, et s'est élevé à £50 5s. 11d. et que les autres ventes ont été faites à différentes dates subséquentes, pour des montants moins élevés; que les susdites marchandises vendues à Dumouchel l'ont toutes été sur un délai et à un crédit de trois mois, à dater de chaque vente; que, depuis le 27 juin 1856 au 21 août 1857 inclusivement, Dumouchel a payé au Demandeur, en différents termes, en déduction du prix des susdites marchandises, £131 9s. 3d.; que Primeau, en s'offrant comme caution de Dumouchel, pour achat de marchandises, jusqu'au montant spécifié dans sa lettre, ne s'est obligé de garantir que le paiement des premières ventes de marchandises qui sera fait à Dumouchel, jusqu'au montant de la somme de cinquante livres; que Primeau est mort le 9 octobre 1856, et ce à la connaissance du Demandeur qui aurait appris ce décès le jour où il est arrivé; que, pendant le laps de temps qui s'est écoulé depuis le moment où le Demandeur a reçu la dite lettre de garantie, jusqu'au jour du décès de Primeau inclusivement, le Demandeur a avancé à Dumouchel des marchandises au montant de £115 19s. 10d. et que, pendant la même période de temps, il a reçu de Dumouchel, sur le prix de telles marchandises, £71 10s., ce qui était plus que suffisant pour couvrir le montant de la susdite garantie de Primeau; que la convention faite entre le Demandeur et Dumouchel n'a pu lier et obliger Primeau et que cette stipulation a été faite pour frauder Primeau, et en contravention à la lettre et au sens de la dite lettre de garantie; que par la dite lettre de garantie, Primeau n'a point cautionné au Demandeur le paiement d'une somme de £50 payable suivant les stipulations que rapporte le Demandeur; que la dette cautionnée par Primeau était la dette la plus onéreuse que Dumouchel eût intérêt d'éteindre, et que les premiers deniers payés par Dumouchel doivent être imputés sur cette créance ainsi cautionnée.

LAFRENAYE, pour le Demandeur, cita le Statut provincial 10 et 11 Vict., cap. 11, sec. 7, pour établir que l'acceptation d'une telle lettre de garantie n'est pas nécessaire, et il prétendit que la convention entre le Demandeur et Dumouchel était conforme à la teneur de la lettre de crédit, et avait eu l'effet de lier Primeau.

CASSIDY, pour la Défenderesse, soutint que l'imputation des

différentes sommes de deniers que Dumouchel avait payées au Demandeur, devait par l'opération de la loi, se faire, de plein droit, sur la dette cautionnée, en sorte que le cautionnement de Primeau avait été anéanti par les premiers paiements faits par Dumouchel.

Le jugement déboute le Demandeur de son action.

LAFRENAYE et PAPIN, Avocats du Demandeur.

LEBLANC et CASSIDY, Avocats du Défendeur.

PEREMPTION D'INSTANCE.—OPPOSITION.

COUR SUPÉRIEURE, Montréal, 29 avril 1859.

Coram BERTHELOT, J.

BLACKBURN *vs.* WALKER, *and* WALKER, Opposant.

Jugé : Qu'une opposition est sujette à la péremption d'instance. (1)

L'opposition qui fut déclarée périmée par le jugement rendu en cette cause n'avait pas été contestée. Le 13 avril 1859, le Demandeur donna avis à l'Opposant qu'il ferait motion, le 17 avril 1859, pour péremption d'instance de son opposition à fin d'annuler. Cette opposition avait été produite le 13 juillet 1859, et rapportée par le shérif du district d'Ottawa, le 3 août 1859, devant la Cour Supérieure siégeant à Montréal, et aucun procédé n'avait eu lieu depuis. La motion du Demandeur est en ces termes : " Motion on behalf of Plaintiff, in as " much as it appears by the certificate of last proceeding in " this cause, signed by the prothonotary of this court, hereto " annexed, that Opposant has failed to proceed with his oppo- " sition within 3 years last past, that the recourse, claim, pre- " tensions and interest, in and by said opposition claimed, be " held to have been and to be lost, *périmé*, and that the opposi- " tion be hence dismissed." Le certificat du greffier est daté du 2 avril 1859. Le jugement rendu par la cour est conforme aux termes de la motion. (3 *J.*, p. 195.)

A. et G. ROBERTSON, Avocats du Demandeur.

BETHUNE et DUNKIN, Avocats de l'Opposant.

(1) V. art 454 C. P. C.

RESPONSABILITE.—VAISSEAU.—COLLISION.

SUPERIOR COURT, Montreal, 31st March, 1859.

Coram SMITH J.

LEGER *vs.* JACKSON et al.

Held: In the case of a collision between two vessels, in the Lachine canal, where the injured vessel was, in violation of the rules and regulations of the canal, on the wrong side of the canal, that the owner of the other vessel is not liable in damages in the absence of proof of "any wilful act or negligence" on the part of crew of the latter. (1)

This was an action for the recovery of £80, for damages suffered by Plaintiff, in consequence of Defendants' steamer coming into contact with Plaintiff's barge, in the Lachine canal, through the gross negligence and malice of those in charge of the steamer. Defendants pleaded that the collision was the result of pure accident, and would not have occurred, had the barge of Plaintiff been on the side of the canal it was bound to occupy, according to the rules and regulations of the canal.

JUDGMENT: "Considering that Plaintiff hath failed to establish the material allegations in his declarations contained, and that Defendants have established that, at the time of the collision referred to and for the recovery of damages arising from which collision, the present action is brought, the barge of Plaintiff was in a position, in the Lachine canal, in which she ought not to have been, and in violation of the rules and regulations made and provided for the navigation of the Lachine canal, and that, at the time of the collision, there was blowing a strong wind from the west, which forced the boat of Defendants towards the side of the canal where the said barge was then moored, and that the collision was the effect of accident, and did not arise from any wilful act, or negligence of the crew in charge of the steamer at the time, the court doth dismiss the action of Plaintiff." (3 *J.*, p. 225.)

J. M. DESJARDINS, for Plaintiff.

CARTIER and BERTHELOT, for Defendants.

(1) V. art. 1053 C. C.

ACTION EN GARANTIE SIMPLE.

SUPERIOR COURT, Montreal, 31st March, 1859.

Coram BERTHELOT, J.

DELVECHIO *vs.* JOSEPH.

Held: 1. That an action *en garantie simple* will lie, by a proprietor, for damages caused to his tenant, by a third party, by reason of the demolition of y *mitoyen* wall.

2. And this, although Plaintiff *en garantie* may himself be liable for a part of the damages recoverable by said third party.

3. That, to maintain the right of action in such case, is to facilitate procedure and avoid a circuit of actions. (1)

This was a hearing upon demurrer by Defendant to Plaintiff's declaration, in an action *en garantie,* by which Plaintiff seeks to charge Defendant with damages caused by him to one Gates, the tenant of Plaintiff, by reason of the demolition of a *mitoyen* wall. For these damages, Gates, in April, 1858, brought his action against the Plaintiff which is still pending. The declaration of Gates sets out: that, on the 3rd February, 1854, he leased from Delvechio, by notarial lease, for the term of five years, a house in St. Paul street, Montreal, known as the Albion Hotel, with the yard and outbuildings belonging thereto; that he took possession, about the 1st May, 1854, and although he had paid his rent and fulfilled his own obligations under the lease, yet that Delvechio had failed to continue him in quiet possession of the premises, and to keep them in a habitable condition, but that he had been disturbed in such possession about the first day of May, 1857; that the outside walls in rear and on both sides, and the roof of said house and of the outbuildings had been removed and taken away, and his property and furniture were thereby exposed to the weather, for a period of six months, that he suffered injury to his furniture and in his business, as a hotel-keeper, for which he had leased the premises, which business was ruined for a year, alleging that these damages were caused, " by reason of the state and condition of the house, and by " the negligence and carelessness of Defendant (Delvechio) " and by his servants and agents, who failed to use reasonable " diligence to have the house kept habitable, &c." He claimed £350 damages. The present action was instituted in January, 1859. The declaration sets out that Plaintiff was proprietor of the property above referred to; that there is an addition, in the rear of the hotel which extends some 70 feet, along the line dividing the property from that of Greenes and Defendant (Joseph) and that, at the end of the addition, along the

(1) V. art. 1616, 1617 et 1660 C. C.

same line, there is a wood shed and stable. The lease to Gates is then set out; that he took possession 1st May, 1854, and had since occupied the property, as a hotel; that, about the 1st May, 1857, Defendant demolished the *mitoyen* wall, between his and Plaintiff's property, in order to build; that this was the wall of the addition to the hotel above referred to, and also of the shed and stable, and, by its demolition, the interior of the buildings was exposed for some fifty feet; that the wall was in good condition, at the time it was taken down; that Defendant did not repair Plaintiff's premises, but left them open for six months, whereby Gates, his tenant, lost the use of his premises, suffered by exposure of his goods and furniture, and also by loss of custom; that Gates, his tenant, had brought his action as above referred to, claiming £350 damages, to which Plaintiff had not yet pleaded. Plaintiff then alleges, that the damages which were caused, or which may have been caused, were so caused in great part by the fault and negligence of Defendant (Joseph) in not closing, by a partition, the part of building uncovered, and, by leaving them exposed for six months, and for not having restored the buildings of Plaintiff to the condition in which they were before the wall was taken down; that Delvechio, as the lessor of Gates, is liable to him for his damages in the premises, and that Joseph is bound to guarantee Delvechio, in the action of Gates, and to indemnify him for any condemnation he may suffer in respect to the acts of Joseph. Defendant pleaded a *défense en droit*, which was dismissed.

BERTHELOT, J.: La défense en droit a pour but de nier au Demandeur le droit de l'appeler par une action en garantie simple, à le garantir des dommages qu'il pouvait avoir causés, lui Défendeur, au locataire du Demandeur, en démolissant le mur mitoyen qui séparait leurs héritages, et en laissant à découvert le locataire, plus longtemps qu'il n'était nécessaire. Raison de la défense: 1° parce que le Défendeur n'était pas partie au contrat pour l'infraction duquel le Demandeur est poursuivi; 2° parce que le Demandeur n'admet pas que des dommages aient été causés; 3° parce que le Demandeur ne prétend pas que tous les dommages ont été causés par Joseph, et qu'il ne dit pas lesquels ont été causés par lui; 4° parce que le Demandeur ne se plaint que de la négligence du Défendeur, en faisant un acte légal, ce qui ne peut donner lieu à une action en garantie; 5° parce que, supposant les allégués vrais, il s'ensuivrait deux actions indépendantes l'une de l'autre par Delvechio et par Gates contre Joseph. La question peut se réduire à celle-ci: peut-on être passible d'une action en garantie simple, sans être ou avoir été partie à la convention ou au contrat, qui a donné lieu à la poursuite contre

la garantie ? Ou encore la garantie peut-elle être exercée sans le secours d'aucun contrat qui oblige le garant, mais seulement par suite des obligations que la loi lui impose formellement ou tacitement. Si le Défendeur s'était obligé par quelqu'*acte* à garantir le Demandeur de ce qui fait le sujet de la demande principale, il y aurait moins de difficulté, et il suffirait de faire l'application des principes et de la doctrine maintenus par la Cour d'Appel, dans la cause de *Gauthier* et *Darche* rapportée au 5 *R. J. R. Q.*, p. 400. Mais dans l'espèce actuelle, ce qui fait la difficulté, c'est que, s'il y a garantie à exercer par le Demandeur contre le Défendeur, elle résulte uniquement de la seule force de la loi, qui, en donnant au Défendeur, le droit de démolir le mur mitoyen des héritages des parties, a voulu aussi qu'il fût responsable, et même garant des dommages, qu'il ferait encourir au locataire du Demandeur par négligence. La garantie de droit, celle qui est établie par la loi, qui est de la nature du contrat, etc., n'a pas besoin, dès lors, d'être stipulée. Merlin la définit : " Un acte par lequel le " Défendeur, au principal, appelle en cause la personne contre " laquelle il a un recours à exercer." Rodier : " Le garant " simple est celui qui est tenu par le droit, ou par convention, " de relever et indemniser celui qui est recherché par action " personnelle." Roger et Collard : " Le garant n'est tenu d'as- " sister le garanti que lorsque celui-ci n'est pas en état de se " procurer justice par lui-même." Ce serait bien le cas, dans l'espèce actuelle, puisqu'il n'y a que le Défendeur en garantie qui puisse bien expliquer ce qui a été fait. Ferrière, *Grande Coutume*, article 203 : Il y est dit que celui qui fait la démolition du mur mitoyen pour son utilité seule, est obligé de garantir son voisin des dommages. Fournel, *Du voisinage*, vol. 2, De la reconstruction du mur mitoyen, page 323. Après avoir parlé de ce que les maçons sont tenus de faire, aux termes de l'article 203 de la Coutume, avant de procéder à la démolition d'un mur mitoyen, et de l'inconvénient qui pourrait résulter de l'insolvabilité des maçons, s'ils étaient seuls responsables, il ajoute : C'est pourquoi les propriétaires qui font faire les ouvrages doivent être *garants* envers les voisins des dépens, dommages et intérêts causés par les démolitions, percements, et réédifications faits au mur mitoyen. Si les propriétaires qui bâtissent sont garants envers leurs voisins des dommages qui leur sont causés par la démolition du mur, pourquoi ne le seraient-ils pas aussi de ceux causés à leurs locataires ? Je ne vois pas qu'il y ait raison de faire une différence. L'article de la Coutume a dérogé au droit commun, en permettant à celui qui veut bâtir de forcer son voisin à souffrir la démolition. Il y a pour ainsi dire suspension du droit de jouissance de la propriété au profit du voisin. Et il ne serait pas tenu de garantir

le Demandeur de tous les dommages qu'il peut lui avoir occasionnés ? Ce serait une grande injustice. Le Demandeur ne peut bien se défendre de l'action intentée contre lui; qu'en ayant en cause pour l'aider, celui qui a causé les dommages et qui a dirigé les travaux qui y ont donné lieu. L'on pourrait même dire qu'il est de l'intérêt du garant de connaître ce que l'on prouvera contre le garant sur l'action principale, puisqu'il doit être tenu au moins pour une partie des dommages réclamés, ne fût-ce que par action ordinaire, en recours d'indemnité. La procédure sera facilitée en maintenant la demande, et en évitant le circuit d'action qu'il faudrait faire autrement.

La preuve qui sera faite démontrera quelle portion des dommages doit être supportée par M. Delvechio, et quelle portion par M. Joseph. Défense en droit déboutée. (3 *J.*, p. 226.)

LEBLANC and CASSIDY, for Plaintiff *en garantie.*

CROSS and BANCROFT, for Defendant *en garantie.*

PROCES PAR JURY.

SUPERIOR COURT, Montreal, 30th April, 1859.

Coram BERTHELOT, Asst.-Judge.

FAWCETT et al. *vs.* THOMPSON et al.

Held : That an action *en revendication* of stolen goods, although between merchant and merchant, is not susceptible of trial by jury. (1)

This was a motion by Defendants to set aside the inscription for *enquête* by Plaintiffs, on the ground that Defendants had, by their plea, declared their option and choice of a trial by jury. The action was brought to revendicate a large quantity of leather, which Plaintiffs alleged had been stolen from them, and the plea set up a *bonâ fide* purchase in open market.

ROBERTSON, in support, contended that, inasmuch as the parties were merchants, and that Defendants had, by their plea, alleged a purchase of the goods in good faith and in open market, that they had a right to have that issue of fact tried by a jury, if not under the old law regulating the trial by jury, in civil cases, at least, under the provisions of the 8th sub-section of the 4th section of the Act 14 and 15 Vict., ch. 89.

BETHUNE, *contra*, argued, that the nature of Plaintiffs' demand, and not the issue raised by Defendants' plea, must determine the question as to whether or not the case was susceptible of trial by jury. Now, Plaintiffs' demand here being

(1) V. art. 348 C. P. C.

one *en revendication*, for the purpose of recovering stolen property, was clearly not a "debt, promise contract or agreement of a mercantile nature," and was not, therefore, subject to a trial by jury. As to the provisions of the act 14 and 15 Vict., they made no change in the requirements of the 25 George III, ch. 2, sec. 9, as far as the nature of the action was concerned; the sub-section relied upon merely impliedly admitting that the suit or action need not necessarily be between merchant and merchant, provided the cause of action be of a mercantile nature. Moreover, the judgment of the Court of Appeals, in the case of *Davidson et al.* vs. *Moffat et al.*, had settled the jurisprudence on the point in controversy. (1) The court was with Plaintiffs and the motion was rejected. (3 *J.*, p. 229.)

BETHUNE and DUNKIN, for Plaintiffs.

A. and W. ROBERTSON, for Defendants.

VENTE.—CHOSE VOLEE.

SUPERIOR COURT, Montreal, 30th November, 1859.

Coram SMITH, J.

FAWCETT et al. *vs.* THOMPSON et al.

Held : 1st. Where A. B. & Co. agreed to tan a quantity of hides, the property of C. D. & Co , and to deliver the leather, when tanned, to the latter who were to have the exclusive right of sale thereof, on the understanding that the former were to be entitled to a certain share of the profits arising from the sale of the leather by the latter and, instead of so delivering the leather, when tanned, to C. D. & Co. one of the members of the firm of A. B. & Co., without the knowledge even of his partner, conveyed the leather into a foreign state, and sold the same

(1) The case here referred to was n° 186, *Davidson et al.* vs. *Moffat et al.*, Q. B., Montreal, and was instituted by the assignees of the bankrupt estate of Ferguson, Millar & Co., to revendicate certain barges, from Messrs. Gillespie, Moffat & Co. The case was tried before a special jury, and a verdict given for Plaintiffs. Defendants then moved in arrest of judgment, praying that the court would "revise and set aside the interlocutory order of this court, made upon the twenty-ninth day of July last, upon the motion of Plaintiffs, of the fifteenth day of July last, and also that this court would revise and set aside, and declare null all other orders, rules and proceedings had and taken in this cause upon and since the said fifteenth day of July, and declare the same to be illegal, and that this court would arrest and stay the pronouncing of, and not pronounce judgment on the verdict rendered by the special jury." The Court (composed of Justices ROLLAND, GALE and DAY,) rendered judgment on the 28th of September, 1844, as follows : "The Court, considering that this action was not susceptible of a trial by jury doth grant the motion, and the Court hereby declaring the Interlocutory order made in this cause on the 29th day of July last, illegal, doth set aside the same, and declare null all the proceedings had in this cause since the fifteenth day of July last." From this judgment, an appeal was sued out, and, by the judgment rendered on such appeal, on the 10th day of July, 1846, the Court of Appeals (composed of SIR JAMES STUART, Chief Justice, and Justices BOWEN, BÉDARD,

for his own benefit, assuming, at the same time, a fictitious name, that such an act was not a *vol* as understood by the law of Lower Canada.

2° That, apart from any question of *vol*, A. B. & Co. had no right to revendicate such leather in the hands of a third party who had purchased the same for a valuable consideration, unless the latter acted in manifest bad faith.

3° That proof to the effect, that the leather, comming as it did from a foreign market, ought to have borne the stamps and marks and was in the main unrolled, and that the price paid was low, at a time when leather was particularly scarce, is not evidence of bad faith on the part of the purchaser, sufficient to justify the revendication of the property by the party claiming it. (1)

This was an action *en revendication* to recover 3657 sides of henlock sole leather, which Plaintiffs, who were carrying on business in New-York State, alledged was their property, and had been stolen, taken and carried away into Canada, and there came into the unlawful possession of Defendants who were leather dealers at Montreal. Defendants pleaded that they had purchased the leather, together with a much larger quantity, from divers persons in possession thereof, and acting as proprietors and owners, and are entitled to sell the same, at Montreal aforesaid, and who, according to the usual custom of trade, had imported the same into this province; that Defendants purchased and paid for the leather in the usual course of business, in good faith, and without knowledge of any right, claim or pretension of Plaintiffs in respect thereof; that Plaintiffs, by permitting the leather to be imported into this province, by parties having the same in their possession, were debarred from any recourse against Defendants, as *bonâ fide* purchasers thereof, for good and valuable considerations, in the usual course of business and that Plaintiffs recourse was only against the party or parties so entrusted with the leather. Plaintiffs replied specially: "That it is not true that Defendants were *bonâ fide* purchasers, in the usual course of business; that, on the contrary, Defendants, who are large dealers in leather, well knew, at the time they pretend to have purchased the same, that the leather came from the United States of America, and that all leather so coming from said United States, in a legitimate manner, is

MONDELET (D.), and GAIRDNER), confirmed the judgment of the Court of Queen's Bench. The following was the judgment of the Court of Appeals: "The court, considering that the subject matter of the action of Respondents, in the court below, was not such as legally to admit of a trial by a jury, and their verdict thereupon and that the interlocutory judgment of the court below, ordering a trial by jury, and the proceedings thereupon had, and the verdict of the jury rendered were and are illegal, and, considering, therefore, that, in the judgment of the court below, which hath been appealed from, there is no error; it is adjudged, that the judgment appealed from, of the court below rendered on the twenty-eight day of September, 1844, be, and the same is hereby, in all things, affirmed."

(1) V. art. 2268 C. C.

put up in rolls, and bears the stamp of the tanner who tanned it, and likewise certain marks indicating the weight thereof, and the stamp of the inspector who inspected it, indicating its weight and quality; that Defendants, moreover, well knew, at the time of their said pretended purchase, that leather was unusually scarce, and of very ready sale in the state of New-York, whence the said leather was brought, at the time they so pretend to have purchased it; that, notwithstanding the premises aforesaid, the leather was offered to Defendants, in a loose and unrolled state, and without any tanner's or inspector's stamp thereon, or any mark whatever indicating its weight or quality, and at a price about or below what Defendants well knew, at the time, it could be sold for in the State of New-York, from whence it was so brought, and this notwithstanding the costs of transportation thereof from the said state, which they well knew to be very heavy, and the provincial custom's duty thereon of fifteen per cent."

BETHUNE, for Plaintiffs, contended that the evidence of record clearly established that the hides from which the leather was manufactured were the property of Plaintiffs, and were by them delivered to a firm of W. H. and F. Stevens, to be tanned, on an understanding that the latter were to deliver the leather, when tanned, to Plaintiffs, who were to have the sale and exclusive right of sale thereof, the tanners being entitled to a certain share in the profits to arise from the sales; that, after the hides were tanned, they left the tannery *en route* apparently to Plaintiffs, but, on the way, the junior member of the same firm, whose name was Fletcher Stevens, caused the leather to be diverted from its proper course and taken into Canada, where, under the assumed name of F. Stafford, and with the assistance of one Stanton whom he had hired to accompany him on the journey, and who went under the assumed name of L. L. Stratton, he sold the leather to Defendants, and converted the proceeds to his own benefit, Walter R. Stevens, the senior member of the said firm, being in total ignorance of any such diversion of the leather from its intended destination. Under such circumstances, it was manifest that Plaintiffs could revendicate the leather in the hands of Defendants notwithstanding the Defendants might have bought the same for a fair consideration and in good faith. The principle of law governing the present case was "*nemo plus juris in alium transferre potest quam ipse habet.*" Then, as to the question of *vol*, as understood by our law, he referred to Domat, *Supplément au droit public*, lib. 3, tit. 8, sec. 1, p. 157; Guyot, *Répertoire*, verbo *Vol.*, p. 644, *première partie;* and, as to the general right to revendicate property as in the present case, he referred to Pothier, *Traité*

des cheptels, N° 50; *Grand Cout.*, vol. 2, p. 1324, N° 14; Domat, *loco citato*, s. 10, p. 158; *Ar. de* Lamoignon, vol. 1, p. 132, 133, N° 96 and 93; *Kent's Commentaires*, 2 vol., p. 323 and *seq.* to 325; Guyot, *Rép.*, verbo *Vol.*, 3rd part, 1st sect., p. 664, 665; *Bell's Com.* 1 vol., p. 281 and note 7; *Story, on sales*, § 188, 190, 191, 194, 199, 201; *Long, on sales*, Rand's Ed., p. 167, commencing " in short, the general rule of the English law, &c." and p. 173, commencing " there are many exceptions to the general rule respecting sales in market over, &c." Dalloz, *Rec. per.* 1849, part. 1, p. 145. Then, as to the alleged valuable consideration paid by Defendants and their good faith, he contended that it was in evidence that, at the time the leather was purchased by Defendants, leather was very scarce in Montreal, and that, not only was the price per pound paid for it low, but it appeared, by the receipts produced by Defendants themselves, that a discount of $861. 63 had been allowed on the purchase of a portion of it. It was, moreover, in evidence, that the quantity was most unusual, as coming from New-York to this market; that it was the only instance where strangers had been known to bring in leather from the States to Canada, for sale; that, moreover, all leather coming from the States to this market bears the stamps and marks of the weight and inspection, and is invariably put up in rolls, whereas the leather in question bore no evidence whatever of inspection, nor marks, nor stamps of any kind indicating its weight or quality, and was, moreover, in the main loose and unrolled. It was manifest, therefore, to say the least of it, that Defendants had failed to exercise that sound discretion which the very suspicious circumstances attendant on their purchase plainly called for, particularly in the face of the well known rule *caveat emptor*.

ROBERTSON, for Defendants, contended that, from the terms of the agreement produced by Plaintiffs, it appeared that one of the parties who sold the leather to Defendants was a partner with Plaintiffs and that, in such case, even if the sale was made in fraud of the copartners, the loss must fall on the partnership. So, if several joint owners let one have possession of goods, and he disposes of them improperly, the loss falls on the joint owners; that the sole ground of action, namely, that the leather was *stolen* from Plaintiffs, before it came into Defendants' possession, is not proved; that the distinction between *vol* and fraud, or *escroquerie*, was in favor of Defendants, who could retain the goods, even if obtained and sold unjustly and fraudulently, or in breach of trust, Defendants, the vendees, being ignorant of the fraud; that it was proved that Defendants had paid the full market value of the leather in good faith, and, therefore, the loss must fall on Plaintiffs, on the principle that if one of two innocent parties must suffer, &c;

that, moreover, although it was proved that the leather was sold to Defendants, yet that the leather seized was not identified; and cited following authorities: 13 Toullier, p. 111, N° 118: 10 and 11, Vic., ch. 10, s. 1; 34 Eng. L. & E. Rep., p. 607; 6 Metcalfe's Rep., p. 74; Parson's Mer. Law, p. 56 & 180; Carr. and Mars. Rep., p. 63; 1 Metcalfe's Rep., p. 362; 4 Duranton, p. 374, 375, 376, 377; 15 Mees. and W., p. 216; 12 Dalloz, *vo* Vente et Echange, 860, 862 and note; 1 Rondot, p. 423; *Code civil an.*, p. 953.

PER CURIAM: This was an action *en revendication*, to recover a quantity of leather from a firm doing business in this city, of which leather, Plaintiff asserted that he was the owner, and, further, that it had been stolen from him, and had since come into the possession of Defendants. Defendants replied that Plaintiffs were not the owners of the leather; that they purchased it in good faith from the proprietor; that they had given an adequate price, and had bought without any suspicious circumstances. Further, they said that, even if Plaintiffs were the owners, yet having allowed the property to go into the possession of others, who had brought it to Canada, as the apparent proprietors, Plaintiffs could have no recourse against Defendants, who had bought it. The Plaintiffs answered that the circumstances of the sale were such as to excite suspicion of fraud; that the leather was not in the condition in which leather was usually brought from the United-States for sale; and that there were circumstances to show that the sellers were not in good faith, as, for instances, that the purchase was for a very low price. The evidence for Plaintiffs had been procured by a *commission rogatoire*, and it seemed that Fawcett & Co., of New-York, being large dealers in leather, had entered into a contract with Stephens & Co, by which the former were to furnish hides to be tanned by the latter. The leather thus made was to be re-delivered to Fawcett & Co., at a certain place in New-York, to be sold by them. After certain deductions and percentages, the profits and loss were to be in common. Fawcett & Co. were, in addition, to receive a percentage to guarantee all sales made on credit. This was how Stephens, who sold to Defendants, became possessed of the leather, and, under the terms of that contract, Fawcett & Co. claimed to be the proprietors of it. His Honor was against them on this ground, and considered that the contract disclosed a copartnership. It was sufficient proof of this that the profit and loss was to be divided. It was, moreover, shown by the agreement, that Fawcett & Co. were to guarantee the sales, for, why guarantee the sale of what was absolute property? It had been objected that the agreement that the leather should be sent to New-York, necessarily controlled the

right of property; and that was true, as between Fawcett and Stephens; but it could not be true as to third parties to whom these partners would appear in the light of all other partners. To make such a pretension available, it must be shown that Defendants were aware that Stephens was fraudulently converting the property of the copartnership to his own use. This brought him to another part of the case, the want of evidence that Plaintiffs had ever been in possession of the leather after it had ceased to be in the condition of raw material, and this would be necessary, in order to sustain the action, unless there were also proof of bad faith. No doubt, according to the evidence, there had been an enormous fraud practised on Plaintiffs by Stephens getting possession of some 20,000 hides, converting them into leather, and, instead of delivering the leather at New-York, bringing it into Canada to sell it. It was proved that Stephens had changed his name and that, after passing the leather for a certain distance in the direction of New-York, in order to deceive all parties, he had altered its route, and brought it to Montreal. He had committed a great fraud; but he was the apparent owner, and was in possession of right of copartnership. As to the particular circumstances on which Plaintiffs rested to make out fraud, the first was that the leather was not stamped, as was common with leather coming from the United States. But, though leather was usually stamped after it reached the large cities, there was no evidence that this was usually done in the provinces where it was made, or that it would be done in the ordinary course, in the case of leather manufactured in the interior and sent over the Ogdensburg Railroad to Montreal. Another point was that the leather was not rolled. A part was rolled; and, as to the rest, there was evidence that the circumstance was not of a kind to excite suspicion. As to the price, there was conflicting evidence; but, considering the quantity amounting in value to $10,000, he was of opinion that the price paid was not such as to carry a necessary inference of fraud. Another point insisted on by Plaintiffs was that Stephens was in possession by theft; but there could be no such theft by copartners of goods belonging to the copartnership, as could give rise to a revendication.

The following was the *considérant* of the Judgment: "The court, considering that Plaintiffs have failed to establish the material allegations of their action, and, particularly, that Plaintiffs were at the time stated, the absolute owners and proprietors of the leather seized, or that Plaintiffs ever were in possession as proprietors of the leather so seized; and, further, considering that Defendants have established that they purchased the leather from persons in possession thereof,

as the apparent owners and proprietors thereof, and without any knowledge of any fact which could have excited the suspicion of Defendants, that the parties so in possession were not, in fact, the owners thereof, the court doth dismiss the action." (4 *J.*, p. 234.)

BETHUNE and DUNKIN, for Plaintiffs.

A. and W. ROBERTSON, for Defendants.

VENTE.—POSSESSION.—VOL.

COURT OF QUEEN'S BENCH, Montreal, 6th September, 1861.

Coram HON. SIR L. H. LAFONTAINE, Bart., Ch. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET (C), A.-J.

FAWCETT et al. (Plaintiffs in Court below), Appellants, *and* THOMPSON et al. (Defendants in Court below), Respondents.

Held : That possession of moveables presumes title or right of property therein, and therefore (except in cases of theft, violence, and perhaps accidental loss) that the purchaser of moveables, *bonâ fide*, in the usual course of trade, acquires a right of property in them, although they may have been sold by one who was not the owner thereof.

This was an appeal from the judgment of the Superior Court, rendered at Montreal, on the 30th of November, 1859, a full report of which is to be found *supra* p. 463.

MONDELET, J. (*dissentiens*): I have carefully gone over the evidence, and have, without much difficulty, come to the conclusion, that the court below (Smith, J.) erred in its judgment, whereby Plaintiffs' action was dismissed. It seems to me that the court below misapprehended the relative positions of Plaintiffs and the Stevens, and considered them as copartners. There was no such thing. The hides belonged to Plaintiffs, they were sent and delivered to the Stevens to be tanned, they were to have been returned to Plaintiffs by the Stevens; Plaintiffs were the sole owners and proprietors of the leather, when tanned, and the Stevens, who had no share or rights whatever in that leather, were merely to get some profits out of the sale of the leather, when disposed of. Consequently, it is manifest that Fawcett & Co., independent of the question of *vol, fraude et escroquerie*, on the part of the Stevens, had, at the time of the bringing of the action, full right to claim the leather at the hands of the Stevens, and to seize and revendicate it in whomsoever's possession they found it. But, going farther into the case, Defendants had more than sufficient under their eyes to suspect that all was not right. They are not as guilty as the Stevens of course; the latter have been nothing short of swindlers,

the evidence leaves no doubt on that point. Still Defendants, who pretend that they have purchased the leather *in good faith*, and *for good and valuable consideration*, from the *owners, in the usual course of trade*, have done no such thing. There could be no good faith ; they saw how the leather was, the state in which they saw it, chiefly loose, instead of being rolled, should have, as probably it did, excited their suspicions. No mark of inspection, that alone shews that the leather was not brought here in the usual mode and usual course of business. As to the ownership of the men who brought the leather in Montreal, the evidence has made that point clear enough in itself, they were swindlers or thieves, and it was for Defendants to make out this important part of their defence ; they have not done so. How have Defendants established their purchase to have been a good and valuable consideration ? The very reverse is the case. The leather was scarce both in the New-York and Montreal market, and still they got the leather at a very low price. As to the idea that Fawcett & Co. have allowed the leather to be brought into Montreal, and have thereby lost their recourse against Defendants, it is simply ridiculous : how could they prevent what they neither knew nor suspected ? When, where and in what manner have they ever consented to be swindled and robbed in that audacious way ? The identity of the leather is well made out. It may as well be remarked that the conduct of Defendants, at the time the leather was seized, does not entitle them to much commiseration at the hands of the court. Upon the whole, I am of opinion that the judgment of the Superior Court ought to be reversed.

MEREDITH, J. : In this case, which is one of considerable interest to all persons engaged in trade, we have to consider first, whether the agreement of the 7th August, 1855, between W. H. and F. Stevens and Plaintiffs created a partnership ; and, secondly, whether Defendants can be considered to have purchased the leather in question in good faith, in the ordinary course of trade ; and, if so, whether the sale so made to them is effectual as against Plaintiffs. I agree with the other judges of this court, in thinking that the agreement of the 7th August, 1855, did not create a copartnership. Under that agreement, W. H. and F. Stevens, as men of skill and art, acted as the agents of Plaintiffs, in tanning leather which Plaintiffs had purchased in their own names and with their own funds ; and, whilst the leather was being tanned, in the possession of the tanners, their possession was the possession of Plaintiffs as owners. On the first question, therefore, I am with Plaintiffs ; but the second question must, I think, be answered in accordance with the pretensions of Defendants

The facts relied on as showing that Defendants were not in good faith, are, that leather from New-York is generally brought to Montreal inspected and in rolls, whereas the leather in question came in, in sides, without having been inspected; and, secondly and mainly, the low price at which Defendants. made the purchase. It appears that, according to the usual of trade, up to the present time, although a considerable quantity of leather from the states adjacent to Canada, is required for the canadian markets, yet that the whole, or almost the whole, of the American leather which is required by canadian, is taken to New-York, and inspected there; and this, although such leather may have been tanned to the north or Canada side of New-York. The sellers of the leather in question, in effect proposed to change this mode of dealing; and if this could have been done honestly, neither the Montreal trader nor the canadian public would have any reason to complain. It is proved that Fletcher Stevens called upon Defendants, at their place of business, in Montreal, in the month of August, 1856; that being about two months before the first of the sales in question, and, after some conversation with respect to the price of leather at Montreal, he mentioned "that he would like to open a trade in Canada for his leather, which he had usually sent to Philadelphia, New-York, or Boston," and, before leaving the premises of Defendants, he pointed out a lot of leather to Thompson, one of Defendants, who told him that, for a similar lot laid down at Montreal, he would pay him at the rate of 27 cents per pound. The proposal made by Stevens was not, it appears to me, calculated to create suspicion. Assuming that the leather in question was required for the Montreal market, the tendency of the proposed arrangement was to save the carriage of the leather from Roundout, on the Hudson River, to New-York, and from New-York back to Roundout, also the charges for cartage, storage and inspection at New-York, to which may be added the profits of the New-York merchant. It is not, therefore, surprising that a wholesale dealer in leather, at Montreal, should have been willing to enter into the arrangement proposed by Stevens, under which, of course, the leather would not have come in as usual, in rolls, and bearing the New-York inspection mark; but, on the contrary, uninspected and loose or in sides; it being obvious that leather cannot be inspected and stamped while in rolls. In the following month of October, Stevens, as he had proposed, returned with a large lot of leather, and, after it had been seen by a number of dealers in that commodity, and, after different offers had been made for parts of it, he sold the whole lot to Defendants, at the price which, in the previous month of August, they said they would

be willing to give. Now, although, under ordinary circumstances, Defendants might have expected to have seen such a lot of American leather, in rolls and bearing the New-York inspection mark; yet, it appears to me, that, after the negotiation which had taken place between Stevens and Defendants, about two months before, that the latter would have had reason to have felt surprised if the leather had been taken to New-York and inspected there, preparatory to its being brought into the Montreal market, where Stevens said he wished to open a trade. I, therefore, think that there was nothing in the state in which the leather was brought into this market, to excite the suspicions of Respondents. The other circumstances which is thought to justify doubt as to Defendants having been purchasers in good faith is the lowness of the price paid by them. On this point, the evidence is conflicting. It is plain, however, that the leader could not have been purchased in the market, and sold in the Montreal market at any thing like the price paid by Defendants. But it is to be recollected that the leather in question had come direct from the tannery to the Montreal market and, as by this means, the New-York charges, and the profits of the New-York merchants had been saved, it could, even without dishonesty, have been sold much cheaper in Montreal than if it had been in the first instance sent to New-York. But, even after taking these circumstances into consideration, there is still a very great difference between the evidence on the part of Plaintiffs and the evidence on the part of Defendants. The Plaintiffs have proved that prime sole leather was worth, at the time of the first sale in this market, about 30 cents per pound, and, at the time of the second sale, about 35 cents per pound, whereas the first sale was made at 27 cents, and the second at 28 cents; but the witnesses who give these prices do not speak with reference to the particular lot of leather in question; and, on the other hand, several leather dealers, among others, Camarant, Fitzimmons, Harris, Delorme and Childs, prove that the leather in question was not of the best description, and the same witnesses, excepting Childs, who does not speak as to the point, prove that Defendants paid the full market value for the leather. In addition to this we have the important fact that, during the interval of about two months which intervened between the first purchase and the seizure of the leather, Defendants sold large quantities of it,and we find that the prices at which they sold it were not such as to yield them more than a fair profit on their purchase. It is also to be recollected that the sale of this very large quantity of leather above 4000 sides was made without any precipitation and in the most public way. A very greater number of persons must have

seen the leather, between the time it left the tannery and time of the sale ; many of these have been examined in this cause, not one of them says he suspected the perpetration of a fraud ; and, on the contrary, all those who have been examined as to the point, say that, when they saw the leather, in this market, they would have purchased it, had it suited them, without any, even the slightest, hesitation. Under these circumstances, it appears to me, that it would be most unjust to blame Defendants, and to cause them to lose the price of the leather, for not acting upon a suspicion, which does not appear to have been entertained by them, or by any other person. For these reasons, I think the learned Judge in the Superior Court was right in saying that Defendants acted in this matter in good faith. The third point raised in this cause is as to whether the sale made under the circumstances just mentioned ought to be held effectual, as regards Plaintiffs, who where really the owners of the goods sold. Although the abstract question involved in this point is one of great importance, and was at one time much debated, I do not propose to attempt to discuss it in the present case ; not only because it would be out of my power to add anything to what has already been repeatedly said on the subject ; but also because all the Judges of this court are agreed in saying, as the learned Judge in the court below has, in effect, already said, that, according to our law, possession presumes property in moveables, "*en fait de meubles possession vaut titre,*" and, therefore (excepting cases of theft and violence and perhaps accidental loss) the general rule is, that the purchaser of moveables *bonâ fide*, in the usual course of trade, acquires a right to them, although they may have been sold by one who was not the owner. It is true that that rule is opposed to authorities of great weight, and that it may, in many cases, be found at variance with the maxim of the civil law, "*Nemo* "*plus juris ad alium transferre potest quam ipse habet.*" But, as Bell observes, in his valuable commentaries on the principles of mercantile jurisprudence, (1) "an abstract rule laid down in law books sometimes "does not square with the ac- "tual business of life, and, in favour of commerce, a relaxa- "tion of the above rule was introduced to the effect of allow- "ing the possession of moveables, and those otherwise in the "apparent right of commodities not to sell but to pledge them." Bell adds that, in an inquiry ordered by parliament, concerning this matter, it was found, by the committee named by the House of Commons, after many extensive investigations into the law and practice of trade, both at home and abroad,

(1) Bell's Com., vol. 1, p. 485-6-7.

that, in foreign countries, namely France, Portugal, Spain, Sardinia, Italy, Austria, Holland, the Hanse Towns, Prussia, Denmark, Sweden and Russia, the rule of law as applied to moveable property is that possession constitutes title, " and that persons making advances of money upon such property " are not required to enquire to whom it belongs, and are ful- " ly protected for the advances they make." The authorities cited by the learned counsel for Respondents (1), although, as I have already observed, opposed to other authorities of great weight, suffice, I think, to show that such was the rule of our law even before the passing of the 10 and 11 Vic., c. 10 ; but, since the passing of that statute, I think there cannot be any doubt on that point. Being, therefore, as I am, of opinion, that Defendants purchased the leather in question in good faith, in the ordinary course of trade, and also that the sale so made was effectual even against Plaintiffs, as the owners of it, I think the Judgment of the court below must be confirmed.

The rest of the court expressed their concurrence in the view expressed by the Mr. Justice Meredith, and the judgment of the Superior Court was therefore confirmed. (6 *J.*, p. 139.)

BETHUNE and DUNCAN, for Appellants.

HENRY STEWART, Counsel.

A. and W. ROBERTSON, for Respondents.

BILLETS PROMISSOIRES.—PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 9th June, 1860.

Before Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN and DUVAL, Justices, BADGLEY and MONK, Judges *ad hoc.*

CARDEN et al., Appellants, *and* FINLEY et al., Respondents.

Jugé : 1° Qu'une action peut être intentée par les faiseurs d'un billet, contre les exécuteurs du porteur pour recouvrer la possession du billet, payé par l'un d'eux pour partie, au porteur du billet, en son vivant, et pour le reste aux dits exécuteurs.

2° Que, dans telle action, le témoignage doit être réglé d'après le droit anglais, et que témoignage verbal de tel paiement sera réputé légal. (2)

The Appellants, three in number, made a joint and several promissory note, for $250, in favor of Seneca Paige, dated 16th May, 1854, payable two years after date. Paige died in October 1856, and Appellants instituted their action against

(1) See particularly first Bourjon, pp. 458, 459 ; Marcadé, *De la Prescription*, on art. of Code 2280, pp. 246-7-8-9 ; Troplong, *Prescription*, No 1055.

(2) V. art. 1233, 2340 et 2341 C. C.

his executors to recover back the note, upon the ground that it had been paid, namely: $200 paid to Paige, "about the end of June, 1856," and the balance since his death to his executors. The plea denied that the note had been paid in full. The evidence was adduced before a *commissaire enquêteur*, and the objections made on behalf of Defendants to the proof by parol evidence were reserved for the decision of the court. At the hearing on the merits, a motion was made to obtain a decision of the court as to the legality of such evidence.

MONDELET, Justice, then sitting in the Superior Court: Three witnesses say they were present at the payment of the $200 to Paige, can this be proved by witnesses? Another objection was made by Defendants' Counsel, to the effect that it was stated in the depositions taken before the *commissaire enquêteur* that the witnesses persisted in the truth. I was, at first, under the impression that, under the 16th article of the 22nd title of the ordonnance of 1667, the witness must declare that he persists, but the words of the ordonnance are: "*Et s'il y persiste il signera.*" It is not a nullity declared so by law. (1) As to the proof by witnesses, the Plaintiffs urged that they are entitled to adduce such proof under the Statute of 1849, 12 Vict., ch. 22, sect. 25. (2) This is as much as to say: "Look, in all cases to the laws of Lower Canada," and also: "Look, in all cases, to the laws of England." If the legislature overshot the mark, it is not affair of mine. I look upon the proof as insufficient in law, and the action must be dismissed. As an individual I would say the money was paid, as a Judge I cannot say so. Judgment rendered the 30th April 1859. "Considering that Plaintiffs have made no legal and sufficient proof of the payment of the $200, in discharge of the note." Action dismissed.

In appeal, AYLWIN, Justice, dissenting, recapitulated the evidence which he held not sufficient, even if legal, to establish the payment of the $200 referred to. In the next place, he held parol evidence illegal. The evidence was to be governed, no doubt, by the rules pointed out by the laws of England. The maxim of the law cited by Broom, p. 255, he held applicable.

(1) V. art. 264 et 293 C.P. C.

(2) "In all matters relating to bills and notes, not herein specially "provided for, recourse shall be had in all courts in Lower-Canada, to the "laws now in force there, and, in the absence of such laws, to the laws of "England in force at the time of the passing of this act; and, in the investi-"gation of all facts in actions and suits founded upon bills and notes, recourse "shall be had, in all such courts, to the laws of England in force at the "time of the passing of this act; provided, always, that bills or notes en-"dorsed by persons not traders shall be subjected, in matters of proof "thereon, to the said laws of England." See also Statute of 1851, 14 and 15 Vict, c. 62, sect. 4.

He referred also to Gilbert, on *Evidence*, p. 194, where it was said that " neither want of consideration, nor fraud in the " commencement, nor satisfaction, unless indorsed on the note " itself, can be given in evidence to defeat the claim of the " value which it purports to convey." He referred also to 1 Greenleaf, on evidence, sect. 202, where it is held that, before breach, " any obligation may be totally dissolved by an oral agreement." And to 4 Espinasse, p. 67; 1 East, 460, and to 2 Bell's Com., p. 325.

DUVAL, J., held that the only question was as to the admissibility of oral evidence to prove payment of the note. As to the fact of payment, there was ample proof. The money was paid on the road, in presence of the witnesses examined in the cause, Paige stating he would indorse the amount upon the note. The mode of payment might not be in accordance with the usage in cities or at Banks, but, in the country, people were ready to take what was owing to them wherever the debtors offered it. He referred to Taylor, *on evidence*, sect. 1043, and to the section from Greenleaf, cited by Mr. Justice Aylwin, as bearing out the view taken by the majority of the court. The section referred, not to proof of payment, but to verbal and extrinsic evidence, which, it was there stated, " is not admissible to alter or contradict a written instrument," the rule not being applicable to evidence adduced to prove that the written agreement was wholly discharged. He held that proof of payment of a note, by verbal evidence, was clearly admissible under the law of England. It had been urged that, as Carden alone had paid the money, the other joint makers should not have been made Plaintiffs in the cause, but the court here had nothing to do with this; no issue had been raised on that head, and the money, although paid by Carden, might fairly be looked upon as the money of the three, who were all liable to third parties upon the note, and all interested in getting it delivered up to them when paid, no matter by whom the payment was made.

BADGLEY, Justice, concurred in the view taken by the court. The authority from Gilbert, cited by the learned judge, referred manifestly to cases where the note was in the hands of a third party. In such cases, want of consideration, fraud in the commencement, and satisfaction, unless indorsed on the note, could not be proved by verbal evidence, but this was not the matter now before the court. Nor was it the question here whether a speciality could be dissolved without a written contract, or whether it could be varied by parol, but simply whether a payment made by the makers of a promissory note to the payee or to the holder thereof, could be proved by verbal evidence. He had no doubt it could be so proved.

The Chief-Justice: It would appear that the court below held that the proof in the cause was not to be governed by the rules of the english law, but such mode of proof was distinctly made applicable by the provincial statutes of 1849 and 1851, relating to bills and notes.

"Considering that Appellants, Plaintiffs in the court below, have adduced sufficient legal evidence that they have paid and satisfied the full amount specified in the promissory note made by Plaintiffs, in favor of Seneca Paige, as by them alleged and set forth in their declaration, and that, by reason of such payment, Appellants have a right to demand that said promissory note be delivered up to them; and considering that Respondents, as executors of the last will and testament of Seneca Paige, retain possession of said promissory note, and unjustly refuse to deliver up the same to Appellants, and that, in the judgment pronounced by the court below, dismissing the action of Appellants there is error, this court doth reverse the judgment, and condemn Defendants to deliver up the note, &c." (3 *J.*, p. 232, 8 *J.*, p. 139, et 10 *D. T. B. C.*, p. 255.)

LEBLANC and CASSIDY, for Appellants.

DOHERTY, for Respondents.

EVIDENCE.—ARCHITECT.

SUPERIOR COURT, Montreal, 30th April, 1857.

Coram C. MONDELET, J.

FOOTNER *vs.* JOSEPH.

Held: In an action by an architect, for drawing plans and specifications, and superintending buildings, that proof, as to value of services' cannot be made by adducing evidence as to custom to pay a certain percentage on the outlay by the proprietor. (1)

This was an action by an architect to recover from Defendant the sum of £96, for drawing plans and specifications, and superintending the building of a block of houses erected by Defendant. The declaration was in the usual *assumpsit* form, with the additional expressions "and for commission, as customary in like cases and usual, to wit, upon the amount expended upon said houses at the special instance and request of Defendants; the whole as per statement and account herewith fyled, to which Plaintiff refers as part hereof." The statement or account contain a charge of 4 per cent. on £2400 amount said to have been expended by Plaintiff. The plea was the general issue. Plaintiff's and Defendant's witnesses both

(1) V. art. 1203 C. C.

attested to the custom of remunerating architects by payment of a commission on the outlay, but differed as to the amount in a case like the present, Plaintiff's witnesses stating it at 4 per cent. and Defendant's at 2½ to 3 per cent.

PER CURIAM : The court is against Plaintiff. I know of no right in architects or any other body of men, be they medical men, lawyers or others, to make tariffs for themselves. Mere proof that a charge of the kind in question is usual, is wholly insufficient. It is moreover an injust rule to establish, even in favor of the architects themselves for it might happen that 4 per cent. was utterly inadequate as a remuneration in certain cases.

JUDGMENT: "The court, considering that Plaintiff hath not proved and established the material allegations of his declaration, namely, that he has against Defendant any right of action for a commission of 4 per cent., as in and by his declaration, and in and by his action, claimed : considering, moreover that Plaintiff hath not proved and established that he ever was employed or requested by Defendant to perform any of the services by him, said Plaintiff, in and by his declaration and action alleged and claimed : and, considering that Plaintiff hat not proved and established that he hath any legal right to recover of and from Defendant any sum of money, for the causes in said declaration seth forth, and claimed by the present action ; doth dismiss Plaintiff's action." (3 *J.*, p. 233.)

MACKAY and AUSTIN, for Plaintiff.

CHERRIER, DORION and DORION, for Defendant.

EVIDENCE.—ARCHITECT.

COURT OF QUEEN'S BENCH, Montreal, 1st December, 1860.

Coram Sir L. H. LAFONTAINE, Baronet, Chief-Justice, AYLWIN, DUVAL, MEREDITH and BRUNEAU, Justices.

WILLIAM FOOTNER (Plaintiff in the court below), Appellant, *and* JACOB H. JOSEPH (Defendant in the court below), Respondent.

Held: That, although an architect has no right in the absence of an express convention to recover a commission on the proprietor's outlay *eo nomine*, yet the value of his services may be established by evidence that the allowance of a commission is usual, and is a fair and reasonable mode of remuneration, in which case he will recover as for a *quantum meruit.*

This was an appeal from the judgment of the Superior Court, rendered at Montreal, on the 30th April, 1859, by Justice MONDELET and reported *supra* p. 477.

MEREDITH, Justice, said that it was beyond a doubt that Plaintiff had rendered services to Defendant; so that all that had to be ascertained was the extent of the liability of Defendant. It was, perhaps, singular, considering the apparent relations of Ostell (the contractor), and Footner (the architect), that the one should have been employed to oversee the work of the other. But that was the fact. Joseph's defence was that the contract being in the name of John Ostell, all monies were paid to him uninfluenced by Plaintiff's certificates; and that he considered Plaintiff was working for his own benefit and not for Defendant's. The certificates, however, were made, and the contract said that they were to be made. Plaintiff must therefore be paid. It had been pleaded that no money could be recoverable except as the result of a special convention. This was not tenable. Merchants, auctioneers and others were allowed commissioners, and architect might be paid commissions too. No advantage could accrue for insisting on a separate charge for every item of the work done by them. It must be understood, however, that he would not give judgment for a commission, if the amount charged under that name were unreasonable. But, in the present case, the whole of the evidence, as well that adduced by Respondent, as that on the part of Appellant, tends to establish that the allowance of a commission is not only the usual, but is a fair and reasonable way of paying the services of an architect. The lowest rate proved was 2½ per cent., and, as there were, in this case, eight houses is one block, he thought that a fair remuneration, and that the judgment below should he reversed and judgment go for Plaintiff for £55.

AYLWIN, J.: The reason of the dismissal of the action in the court below is plain. It was because the judge would not sanction the principal of a payment by commission; and, if the merits of the case were restricted to the demand for the payment of a commission *eo nomine*, he would be disposed to confirm the judgment below; but there was evidence that services which could be estimated had been rendered.

Why then turn Plaintiff round only to make him bring an action, and show that the Defendant was indebted to him, under an other name for these services? The bill of particulars had evidently been drawn by a man who had once in his life seen an english lawyer's bill. It began by the item "taking instructions" but instead of modestly putting down 6s 8d., went on with a long story, and concluded at last with 4 per cent. on the cost of the buildings. Now, it would be dangerous to suppose that architects could establish their own tariff of prices within their own guild, and thus tax their own bills. That could not be sustained, and if the court now adopted the

standard of 2½ per cent., it was not because there was no proper evidence to show what was the value of the Plaintiff's services It was, therefore, necessary to take the evidence given, which seemed to establish 2½ per cent. as a fair remuneration. But he did not subscribe to the doctrine, that because a building costs £20,000 the architect was to have a certain percentage on that sum, on account, perhaps, of the introduction of a number of foreign novelties and luxuries, which in no way increase his responsibility or labour. His business was to see that the house was properly constructed, and the mere expenditure could form no basis of the value of his services. He agreed to the judgment because it did not adopt that basis. The Plaintiff had established the rendering of his services, and the only question was the *quantum meruit*. Of course an architect must have a proper compensation for his time, and if there were involved a large degree of architectural knowledge, property so called, it must be paid for according to the merits of the individual. But the genius architect was not necessarily entitled to 4 per cent., nor to 2½ per cent., and the court had already had reason to know that architects were sometimes very formidable people.

DUVAL, J. : Defendant pretended that the contract for building his houses was really made with Plaintiff, and that, therefore, he was not obliged to pay him as architect. He says, however, that Plaintiff being a bankrupt, the agreement could not be made with him and that it was, therefore, made nominally with Ostell really for Plaintiff's benefit. It was a man's own fault if he chose to go to a notary and sign a paper which set out something which was not the truth. But, in fact Ostell being called as a witness, declared that he and not Footner was the contracter. It appeared by the contract itself that Footner was to superintend the building, and it was proved that he did superintend it. Defendant had not made the least proof to support his case, and let the scale of remuneration he what it might Plaintiff must be paid the value of his services. Judgment reversed (5 *J.*, p. 225, et 11 *D. T. B. C.*, p. 94.)

MACKAY and AUSTIN, for Appellant.

DORION, DORION and SENÉCAL, for Respondent.

CORPORATION MUNICIPALE.—ACTION.

CIRCUIT COURT, for the County of Argenteuil.
Lachute, 14th May, 1859.

Coram SMITH, J.

THE CORPORATION OF THE PARISH OF ST. JERUSALEM *vs.* QUINN.

Held: 1° A corporation must sue in its own name and be itself before the court; and an action in which it purports to be represented by its executive will be dismissed. (1)
2° In such a case there is nothing to amend by.

This was an action instituted by the corporation of the parish of St. Jerusalem d'Argenteuil, for an assessment to which Defendant appeared to be liable for the building of a bridge. The suit was by "The corporation of the parish of St. Jerusalem *represented by the Municipal Council of the parish of St. Jerusalem*, Plaintiff." Defendant pleaded, by *exception à la forme*, objecting to this mode of instituting the action.

ABBOTT, for Defendant, argued that the corporation was not before the court and that the defect was fatal.

BURROUGHS, for Plaintiffs, contended that, as the municipal and road act of 1855 provided that all municipal corporations should act by their councils, the corporation was well before the court by its council.

After argument BURROUGHS, for Plaintiffs, moved to amend the declaration, by striking out the words "represented by the municipal council of the parish of St. Jerusalem," which was objected to by ABBOTT, for Defendant, on the ground that there was nothing to amend by, that the whole proceedings were absolutely null, and that an amendment would create Plaintiffs, when none previous existed.

SMITH, J., had given the case his best consideration; had consulted his brother Judges on the subject, and had also had the advantage of referring to a number of cases in point adjudicated upon by the judges. There was no doubt whatever that the action was wrongly instituted. None, but the Queen, could sue by an attorney or representative, and that was what Plaintiffs here had attempted to do. It was quite true that its municipal council was the instrument or agency by which a municipal corporation acted, but it was the corporation itself which had received, as one of its corporate powers, that of suing and being sued, and it must itself do so in its own corporate name. Unless, therefore, an amendment was possible,

(1) V. art. 3 C. M.

the action must go. But, what was there to amend ? If Plaintiffs' motion were granted, the effect would be to remove entirely from before the court, the council, which now was the only body in court. The corporation were not in court, and if, by the granting of the motion, the council should disappear there would be no Plaintiffs at all. The nine cases of *ex parte* Guines and eight others, decided at Montreal, in October, 1856, by three judges were in point. There similar suits were instituted before a magistrate, in a similar manner to this, and Defendants were condemned, but, on *certiorari*, the whole of the judgments were quashed, on the ground that there was no jurisdiction there could be no amendment. The action must be dismissed. (3 *J.*, p. 234.)

BURROUGHS, for Plaintiffs.

MCLEOD, for Defendant.

ABBOTT, Counsel for Defendant.

DESAVEU.—PROCEDURE.

COUR SUPÉRIEURE, Montréal, 23 mai 1859.

Coram C. MONDELET, J.,

ET

COUR SUPÉRIEURE, Montréal, 26 mai 1859.

Coram C. MONDELET, J.

LA SOCIÉTÉ DE CONSTRUCTION CANADIENNE DE MONTRÉAL *vs.* LAMONTAGNE, *et* LA DITE SOCIÉTÉ, Demanderesse incidente en désaveu, *vs.* LAFRENAYE, Défendeur en désaveu.

Jugé : 1° Que la demande en désaveu est non recevable, avant le jour régulier du rapport de cette demande, si avis de la production n'est pas donné à la partie adverse. (1)

Jugé : 2° Que l'action dans laquelle le désaveu est institué, étant en délibéré, la demande en désaveu est non recevable, quoique rapportée régulièrement d'ailleurs. (2)

Le 23 mai 1859, la demande principale étant sur le rôle, pour audition au mérite, *ex parte*, la Demanderesse fit motion qu'il lui fût donné acte de la production qu'elle faisait d'une demande incidente en désaveu, par elle instituée contre le procureur qui prétendait la représenter au dossier, laquelle demande avait été signifiée au procureur, le 21 mai courant (1859), et était rapportable le 25 du mois de mai, sauf au procureur à n'être tenu d'y répondre qu'après le jour du rapport.

(1) V. art. 186 C. P. C.

(2) V. art. 193 C. P. C.

DOUTRE, pour la Demanderesse en désaveu, expliqua que la demande n'ayant pu être formée et rapportée plus tôt, il croyait qu'il suffisait de mettre la cour au fait de l'institution du désaveu, pour obtenir la suspension des procédés, et notamment de l'audition au mérite ; que la production anticipée de la demande en désaveu ne pouvait préjudicier à personne, et que la motion réservait spécialement les droits du Défendeur en désaveu. En France, le désaveu verbal et même la menace d'un désaveu suffisait pour suspendre les procédés. Merlin, *Rép.*, v° *Désaveu*, 601 ; Carré et Chauveau, t. 3, n° 1314. Ici il y a plus qu'un désaveu verbal, plus qu'une menace, il y a un désaveu formellement institué, et le but de la motion n'est que d'en saisir la cour par anticipation.

PER CURIAM : Il suffit que l'avis de cette production anticipée n'ait pas été donné à la partie adverse, pour que la cour refuse d'en prendre connaissance. Motion rejetée.

Le 25 mai, jour du rapport de la requête et demande incidente en désaveu, la cause principale était en délibéré sur le mérite, et la requête ou demande en désaveu fut produite ; l'hon. juge, éprouvant des doutes sur la possibilité de recevoir un désaveu, quand la cause était en délibéré, reçut la demande en désaveu, sauf à prononcer le lendemain sur son admissibilité.

DOUTRE, pour le désaveu, dit qu'il était incontestable que le désaveu pouvait être formé, en tout état de cause, et même après jugement ; et que, lorsqu'il était institué avant jugement, l'effet immédiat de la production du désaveu était de suspendre tous les procédés, et que cette interruption durait jusqu'à ce qu'il fût adjugé sur le désaveu. Il cita : Carré et Chauveau, t. 3, pp. 267, 274, 275 et suivantes ; Pigeau, *Proc. civ.*, t. 1, p. 348 ; Bioche, *Dict. de proc.*, v° *Désaveu*, n°s 65, 113 ; Merlin, *Rép.*, v° *Désaveu*, § VII, p. 601.

PER CURIAM : La cause principale étant en délibéré, la demande en désaveu ne peut être reçue. Requête et demande incidente en désaveu rejetée. (3 *J.*, p. 235.)

J. DOUTRE, pour la Demanderesse en désaveu.

J. PAPIN, pour le Défendeur.

COMPOSITION OR ATERMOIEMENT.

SUPERIOR COURT, Montreal, 31st May, 1859.

Coram BADGLEY, J.

GREENSHIELDS et al. *vs.* PLAMONDON.

Held: That a promissory note, or any consideration, given by an insolvent debtor to a creditor, in contemplation of a deed of composition, and as a preference to such creditor, without the knowledge of the creditors, is null and void, and will be declared so, even as against the compounding debtor himself.

This action was brought on a promissory note given by Defendant, in favour of Plaintiffs, or order, on the 11th Dec., 1854, for the amount of £100, payable at 20 months from date, with interest. Defendant alleged that, subsequent to the date of said note, on the 5th January, 1855, Defendant, being unable to meet his engagements, he compounded with his creditors, by an instrument in writing, bearing the above date, in virtue of which he obtained a discharge from all his creditors, in consideration of ten shillings in the pound, which he undertook to pay, at certain and specified terms, by notes endorsed in favour of said creditors; that Plaintiffs were parties to the composition, which was executed and carried into effect; that the note declared upon by Plaintiffs being anterior to the date of the composition, it ought, in law, to be covered and discharged by the composition deed; that, if the note was not covered by the composition, it ought to be held as fraudulent and void, as destroying the principle of equality which is the necessary basis of such arrangements between creditors and debtors; that, by law and by the usage of commerce, any preference given by a compounding debtor to any of his creditors is null and void, and that the note sought to be recovered should be declared so. Plaintiffs, in answering to this plea, alleged that the amount of the note in question was not one of the debts for which Defendant compounded; that, at the date of said note, Defendant, besides his personal debts to Plaintiffs owed them £230 4s. 4d., being the balance of an account due by one Desrosiers, whom the Defendant had introduced to Plaintiffs, and for whose debt Defendant was the guarantor; that, when Defendant applied to Plaintiffs to have their consent and signature to the deed of composition, Plaintiffs made it a condition that Defendant should give his note for £100, in payment and discharge of Desrosiers' debt, which Defendant did. The evidence establishes that, in fact, Desrosiers owed to Plaintiffs the above amount of £134 4s. 4d.; that, when Defendant applied for Plaintiffs' signature to the deed of composition, they told him that, besides the amount

mentioned in the schedule of the deed which was Defendant's personal indebtedness, he owed them for the account of Desrosiers, and that, unless he would give them a £100 note, for Desrosiers' debt, they would not sign the composition. Defendant, says the witness, acknowledged his responsibility for Desrosiers' debt, and gave the note. Being cross-examined, the witness states that he is not aware of Plaintiffs having any writing from Defendant except said note, for Desrosiers debt, and that Plaintiffs neither transferred over their claim against Desrosiers to Defendant, nor gave him any receipt or acknowledgment of the settlement of their claim, so as either to discharge Desrosiers, or enable Defendant to recover anything from Desrosiers.

LAFLAMME, for Plaintiffs, contended that, it being proved that the consideration of the note was not included in the composition, and furthermore, that this consideration was not the personal indebtedness of Defendant, for which alone the composition was entered into, the principle invoked by Defendant could not receive any application ; that the principle of equality amongst creditors, parties to a deed of composition, was incident to and an integral part of the bankruptcy law, where it was in existence; that the composition which is in common usage in Canada was not regulated by the exceptional principles of bankruptcy, but had no other foundation than the common law principles, which contained no provision to prevent a creditor from making his condition as favorable as possible; that the composition, as known and practised in this country, was neither the *atermoiement* of the old French law, nor the *concordat*, under the actual code of commerce, both of which were and are nothing more nor less than the mode of settlement between creditors, as it was known to us when we had a bankrupt law. Under the rules governing the *atermoiement* and the *concordat*, the equality between creditors, and the prohibition of all underhand preference, were both equally necessary, as a portion of the creditors could force the composition upon the other creditors; but, here, no creditor is obliged to accept of any arrangement agreed to by any number of creditors, each creditor signs when he is satisfied with the mode of settlement agreed upon between himself and his debtor. And, even in the case where it would be found by the court, that the principle of equality should govern our mode of composition, the violation of that principle could not be set up as a bar to an action like this, by the debtor himself who is *particeps* in the fraud, if any was practised; the other creditors, who have suffered from such fraud, should have the exclusive right of complaining of having been lead to compound on an unequal footing.

DOUTRE, for Defendant, answered that this cause disclosed a kind of transaction which was as commonly practised as it was manifestly fraudulent and void. Plaintiffs being applied to by Defendant to sign a deed of composition, and contriving to secure the full amount of their debt, while the other creditors only receive ten shillings in the pound, bring to recollection that one of their debtors (Desrosiers) had been introduced to them by Defendant. Their refusal to sign placing Defendant at their absolute mercy, the introduction of Desrosiers, which was probably a simple and ordinary courtesy between man and man, assumed the complexion of a positive guaranty by Desrosiers to pay, and they shaped the bargain in this way. Our debt against Desrosiers is lost and dead; but, if you agree to give life to it and pay it by a £100 note, we will sign your composition; if not, we will prevent you from compounding and keep you in the impossibility of earning an honest living for yourself and your family. Any creditor striving to make his condition better than that of his co-creditors, will easily find a motive to explain his harshness with his debtor, his debt is more sacred than that of his neighbour, it was created under peculiar circumstances which should either morally justify him to refuse to compound or entitle him to a preference. In this case, Desrosiers was the pretence, and the evidence establishes that it was even a poor pretence. Plaintiffs had no kind of action against Defendant for Desrosiers' debt; and the note was understood, between the parties, as such a manifest preference, that, when paid, the amount was an absolute loss for Defendant, who could never claim reimbursement from Desrosiers, while Plaintiffs remained in possession of their action against Desrosiers for the full amount of their claim. The distinction which exists between our composition and the *atermoiement* or *concordat* is readily admitted to a certain extent; but it is unquestionable that, though the principle of equality was, for a time, the subject of discussion in France, it is now admitted, both here and in England, as forming part of the common law, wherever a debtor entered into a composition either in or out of a court of bankruptcy. If it had been an exceptional legislation, coextant only with a bankrupt law, as it is pretended by Plaintiffs, it would be astonishing that so many cases should have come to light; because it is almost impossible to find a bankruptcy law, as remote as it can be searched, without a positive provision, declaring null and void any preference given to a creditor, party to a composition under such bankrupt law. How then could it be explained that so many attempts would have been carried to the point of facing a court of justice in direct oblivion or contempt of a positive pro-

vision of the law? The question naturally arose, as in this cause, under the presumption that, the common law being silent on a matter positively settled by the commercial statutory law, no restriction was imposed upon creditors, preventing them from receiving preference from their debtors. The doctrine upon which Defendant relies is this: that all compositions between debtors and creditors are entered into under the positive, though tacit, understanding that those who ostensibly agree to receive a portion of their debt, in full discharge thereof, do not, in reality, receive the whole, or more than the others; that the natural inducement for a creditor to sign a composition lies on the common conviction, amongst the creditors, that it is necessary for them to sacrifice a portion of their debt to save the rest; and, by that sacrifice, the debtor is enabled to resume his business and to pay the composition. If the principle of equality was destroyed, the deed of composition would become the usual mode, for certain creditors of practising glaring fraud, by means of which they would succeed in getting the payment of their debts, not only from their actual debtor, but indirectly from their co-creditors. It is a principle of both the commercial and the civil law, that, when a man becomes bankrupt, *en déconfiture*, his property is invested by law in the person of his creditors. The man who applies to his creditors to obtain a composition is manifestly *en déconfiture*, and, if he remain in possession of his property, it is only as the representative or the legally appointed agent of his creditors, until they dispose of it in one way or another. Then, if a creditor, by some underhand transaction, succeed, during that unsettled state of things, in securing from the common agent of the creditors something more than his share, what he so obtains is in reality taken out of the common stock of the creditors. A few weeks or a few months after this composition, the debtor, exhausted by the satisfaction of the exacting creditors, might be made unable to meet the terms of the composition itself, fall into *déconfiture* again and call for mercy; and, in the meantime, his stock, which had been the common stock of the creditors, would have decreased by so much given to favoured creditors There is no doubt, then, that a contract, having for its object to give a preference to one creditor over the others, is fraudulent towards them, and that there would be no difficulty for the court to declare it null and void, if its nullity were demanded by a creditor. The only serious difficulty which existed for some time in France in the application of the principle involved in this cause, was, with reference to the nullity of such a contract, *quoad* the debtor must be admitted to claim his release from an obligation of this kind. First of all, it is a matter of public policy that a con-

tract founded upon fraud should receive no sanction from a court of justice. Another cause of nullity is found in the common law principle, which declares null all contracts subscribed under the influence of violence of coercion, and there are several instances of moral violence, which are assimilated to physical coercion. The man, who, by misfortune, has been brought into insolvency, is placed in such a state of dependency, as to his creditors, that the moral violence inflicted upon him, by a creditor who threatens to reduce him, to beggary, is very easily conceived. The common law affords him a protection against the obligations assumed under the influence of that violence, by declaring those obligations null, when they are attempted to be enforced by legal remedy or action. Authorities cited by Defendant's Counsel: Pardessus, *Dr. com.*, t. 5, p. 294, No 1238; Dalloz, *Dict. gén.*, t. 2, vo *Faillite*, Nos 568, 569, 570, 572; Dalloz, *Jur. du Royaume*, An. 1827, 2e partie, p. 148; Boulay-Paty, *Faillites et Banqueroutes*, t. 2, Nos 571, 1141; De Villeneuve, *Dict. du cont. com.*, vo *Faillite*, Nos 1066, 1067, 1068, 1085; *Code de com.*, art. 598.

PER CURIAM: The note in suit was made and given to Plaintiffs by Defendant when he was insolvent and trying to settle with his creditors for their respective claims against him, at 10s. in the £. Plaintiffs, at first, declined, because his schedule of liabilities did not show, as they alleged, his entire indebtedness to them, exhibiting only his personal debt, but omitting their claim upon his guarantee for goods sold by them to one Desrosiers. He explained the cause of omission, by stating that he did not wish to include that in his schedule of liabilities, on the face of which he was endeavouring to effect his composition settlement, because his offered securities, Desmarteau, Plamondon and Mousseau, were not aware of Plaintiffs' claim against him as security for Desrosiers; but, after several days of negotiation between them, and after Plaintiffs' positive refusal to accede to the composition contract upon any other terms, they agreed with him to sign the contract, as, upon the face of the schedule, on condition of receiving from him this note for £100, in discharge of their demand upon the guarantee. The note was thereupon given by him and they signed the composition contract, his liabilities, per schedule, amounted to £5,833 12s. 11d., distributed in various sums among thirty creditors, whereof Plaintiffs appear at the head of the list, and are among the earliest in signature to the contract, followed by the largest portion in number and amount of the creditors. The composition contract stipulated that his undersigned creditors, in consequence of his having shewn, by his schedule, that he was unable to meet his engagements in full, agreed and consented to *settle with him for* 10s. *in the £*

on their respective claims, payable by his notes at 6, 9, 12, 15 and 18 months, with interest, and secured by the endorsement of Desmarteau, &c. Before adverting to the facts of record and the authorities of law applicable to the case, it will be convenient to state *in limine* some generally received legal points bearing upon the matter, namely, that a debtor in failing circumstances, *en déconfiture*, can make no change in the rights of his creditors as they were at the time of his insolvency, nor can he give any preference to, nor secure the debt of one, to the prejudice of others of them: Toubeau says, *un failli est interdit de droit:* that a contract will be deemed in fraud of creditors when the obligee knew the failing circumstances of the obligor debtor and derived any preference or advantage by the obligation; that such a contract is contrary to law as being opposed to good morals and public order, and cannot be enforced for the benefit of creditors, any more than for the direct personal advantage of either of the parties; that no action can be enforced upon an obligation, without a cause, or with a false or unlawful one, whoever may demand it; that courts will not lend their aid to settle disputes and transactions which are reprobated and forbidden by law, but will notice, *ex officio*, the illegality of the subject, and allow it to be suggested without any plea and at any stage of the proceeding. These principles deduced from our own law are common to the jurisprudence of all commercial countries where honesty and fair dealing prevail in commercial pursuits, and are to be found *in extenso* in the sister jurisprudence of Louisiana. Reverting now to the facts of this case, we have a debtor in a state of declared insolvency, evinced by Plaintiffs and his other creditors treating with him and accepting his offered composition of 10s. in the £; a verbal guarantee without the statutory requirement to give it a legally binding effect; a concealment of the guarantee itself as well as of the alleged indebtedness thereby from the creditors and parties interested in the composition contract; a private agreement between Plaintiffs and Defendant for his discharge, by means of the note in question from a demand not enforceable at law, and an advantage thereby obtained by Plaintiffs securing payment of this inoperative portion of their claim; a promissory note without consideration; a consent by Plaintiffs of and their subscription to the composition contract. The note is dated 11th of December, 1854, the contract 5th January, 1855, and the note became due only after the instalments of the composition had all matured and been liquidated. After this statement from the record, the law of the case appears in the following authorities: Mr. Justice STORY, in sec. 378-9 of his equity juris-

prudence, thus sums up the matter : " There are other cases of constructive fraud upon creditors, which the whole moral justice of the law has equally discredited and denounced. We refer to that not infrequent class of cases, in which, upon the failure or insolvency of their debtor, some creditors have, by secret compromises, obtained undue advantages, and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition which they supposed to be founded upon the basis of entire equality and reciprocity among the creditors, when, in fact, there was a designed or actual imposition upon all but the favoured few. The purport of a composition deed, in cases of insolvency, is that the property of the debtor shall be assigned, collected, and distributed among the creditors according to the order and terms prescribed in the deed itself, and, in consideration of the assignment, the creditors parties generally agree to release all their debts beyond what the funds will satisfy. Now, it is obvious that, in all transactions of this sort, the utmost good faith is required, and the very circumstance that other creditors of known reputation and standing have already become parties to the deed, will operate as a strong inducement to others to act in the same way. But, if the signatures of such prior creditors have been procured by secret arrangement with them, more favourable to them than the general terms of the composition deed warrant, these creditors act as decoy ducks upon the rest." Sec. 379. In modern times, the doctrine has been acted upon in courts of law as it has long been in Courts of Equity, that such arrangements are utterly void, and ought not to be enforced against the assenting debtor, or his sureties or his friends. There is great wisdom and deep policy in the doctrine, and it is found in the best of all protective policy that it acts by way of precaution rather than by mere remedial justice, for it has a strong tendency to repress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted not for the sake of the debtor, for no deceit or oppression may have been practised upon him, but for the sake honest, humane, unsuspecting creditors, and hence the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favoured creditor, or whether he has been a mere volunteer, offering his services and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy. And it is wholly immaterial whether such secret bargains give to the favoured creditor a larger

sum or an additional security or advantage, *or only misrepresent some important fact*, for the effect on the other creditors is precisely the same in each of these cases. They are misled into an act to which they might not otherwise have assented." Similar opinions will be found in Addison, *on contracts*, page 139, and Story, *on contracts*, sec. 326. The adjudged cases fully bear out the text-writers. They are briefly summed up in Byles, on bills: " The consideration or contract on a bill or note must not be in fraud either of the Defendant or third persons, for fraud totally avoids all contracts both in law and equity." " Equally unavailing is the instrument if it were given in fraud of third persons." " An insolvent proposed to compound with his creditors, but the Plaintiffs being creditors, refused to execute the deed of composition unless the insolvent gave them a promissory note for the residue of the debt due to them. He did so without the knowledge of the other creditors, and the Plaintiffs and others signed the deed. The note was held void as a fraud on the other creditors." Cites *Cockshott* vs. *Bennett*, 2 T. R. 763; *Knight* vs. *Hunt*, 5 Bing, 432, and others. " So the note is equally void if given not by the insolvent but by a third person." " So the note being given with a fraudulent intention, would have been void, though the composition had never been effected." *Wells* vs. *Girling*, 1 B. & B., 447," and any better security than the other creditors have, though for the same amount, if taken without their knowledge, is void as a fraud on them." *Leicester* vs. *Rose*, 4 East, 372. In the leading case of *Cockshott* vs. *Bennett*, Lord Kenyon, Chief-Justice, observes: " On grounds of law, the security taken to give this note was a fraud on the creditors, parties to the contract, in which their debt was to be cancelled in consideration of receiving a composition. This agreement between Plaintiff and Defendant prevented their being put in that situation which was the inducement to the other creditors to sign the deed and to relinquish part of their demands, thereby rendering abortive all that the creditors intended to do for the bankrupt by compounding for their debts: the transaction is bottomed in fraud, which is a species of immorality, and not being available, as such cannot be revived by such promise." BULLER, J., said: " Defendant was absolutely in the power of the Plaintiffs when the note was given, and they took advantage of his distressed situation: if the note had been obtained by actual compulsion, it would be void, now this is equivalent." See also Anstr. 910, 1 Atk. 352, Chief-Justice LEE, 4 East, 371, 6 Scott, *Alsager* vs. *Spalding*, 11 Ad. and E. R. 1033, 1 Stark, 329." So if a man becomes surety for another for the price of goods, as by joining with him on a joint and several note, and the party to whom the surety is

responsible conceals from him a stipulation for an additional sum which it is secretly agreed between himself and the principal that the latter shall pay in liquidation of an old debt, that is a fraud on the surety," &c. *Pidcock* vs. *Bishop*, 3 B. and C., 605." So *a compounding creditor cannot split his demand and compound for part, and afterwards sue for the residue unless he acquaints the other creditors with his proceeding.* See 1 Esp. 131, 2 *Holmer* vs. *Vienor*, case of two claims, one for goods sold, the other for two bills, 5 Bing, 460, *Britton* vs. *Hughes*; held, *if a creditor keep back a portion of the debt due to him, and does not correctly state the amount of his claim in the composition deed, his conduct is fraudulent and he will not be allowed to sue the debtor for the debt omitted.* See 3 Y. and J. 217, *Coleman* vs. *Waller*, 4 B. and C. 511, *Lewis* vs. *Jones*. The same principle runs uniformly through all the cases, from *Cockshott* vs. *Bennett* in 1788 to very recent days." All creditors are presumed to bargain for equality of benefit and mutuality of security; they are not fairly or honestly dealt by if any of them bargains for or receives better terms than others, or makes his position or claim better than it was at the debtor's insolvency." " The question is not alone whether the composition was entered into or not; but whether the transaction was meant as a fraud upon the other creditors, where a creditor undertakes to represent that he had agreed to take 10s., and secures more in fact." In the 2nd vol. of *R. J. R. Q.*, p. 135, a case at Quebec, is reported as follows: " A promissory note to a creditor for the balance of his claim in consideration of his having signed a deed of composition is void, *Blackwood* vs. *Chinic*, 1809, n° 57," sustaining the authorities cited above. The french law is not at variance with the english law in this matter. Pardessus observes: " La bonne foi qui ne permet pas qu'une " personne s'enrichisse aux dépens d'un autre, et qui commande " l'égalité dans les négociations intéressées, veut qu'aucun des " contractants ne fasse entendre à l'autre, des faits contraires " à la vérité pour le décider à prendre une résolution qu'il " n'aurait pas prise sans cela. Elle ne permet pas davantage " qu'il dissimule rien de ce qu'il importe à ce dernier de savoir, " lorsque cette connaissance l'aurait naturellement empêché " de conclure le marché ou lorsqu'il en aurait consenti certaines " conditions dans l'ignorance des choses dissimulées et dans la " supposition de la vérité de ce qu'on lui a dit ou laissé croire." The bankrupt system of France prevents cases of this kind coming ordinarily before the common law tribunals, *atermoiement* being specially regulated by the bankrupt law of the country. But the same principle of common honesty and equal good faith, which, in the textual provision of the article

of the custom, places all unprivileged creditors of the insolvent upon the same equal footing in his means of payment, also prevails in all the courts in matters of contracts. Again referring to Pardessus, n° 1238, the point is put strongly in support of Defendant's plea, and again at n° 1228: " Nous avons fait " connaître les présomptions légales en vertu desquelles cer- " tains actes étaient frappés de nullité. Il ne s'ensuit pas que " tous les autres actes soient valables de plein droit. Il faut " toujours en revenir au principe que ce qui est reconnu fait en " fraude des créanciers doit être annulé. Rejet, 3 février 1829, " D. 29, 1, 129, et ce principe doit être appliqué non seulement " par les tribunaux de commerce dans les matières de leur " compétence, ou par les tribunaux civils dans les autres " cas, etc. Lorsque la fraude est prouvée, quelle que soit la " date de l'acte, il doit être annulé. Ce n'est plus ici le cas " d'une présomption fondée sur la seule proximité de la fail- " lite." He notes among the *indiciæ* of fraud, presumptions from the position of the parties at the date of the contract, its date, character, and nature and other circumstances; but above all if the *acte attaqué est intéressé de part et d'autre, s'il annonce qu'un équivalent a été donné par celui qui le fait valoir ou si cet acte lui procure un avantage purement gratuit,*" in fact, if there have been a consideration, which Pothier defines, " la cause de l'engagement que contracte l'une des parties est ce que l'autre des parties lui donne ou s'engage de lui donner sur le risque dont elle se charge," and which the English authorities define in nearly the same terms: " Consideration means something which is of some value in the eye of the law moving from Plaintiff. It may be some benefit to Defendant or some detriment to Plaintiff; but, at all events, it must be moving from Plaintiff. A good and sufficient consideration is essential to the validity of any simple contract, and the agreement or some memorandums thereof must be in writing; without these the law supplies no means nor affords any remedy to compel performance." Using the language of Lord Mansfield, in *Holman* vs. *Johnson*, Cowp., 343: " The objection that a contract is immoral or illegal, as between Plaintiff and Defendant, sounds at all times very ill in the mouth of Defendant. It is not for his sake however that the objection is ever allowed; but it is founded on general principles of policy, which Defendant has the advantage of, contrary to the real justice as between him and Plaintiff, by accident if I may so say. The principle of public policy is, *ex dolo malo non oritur actio.* No court will lend its aid to a man who found his cause of action upon an immoral or an illegal act. If from Plaintiffs own stating or otherwise, the cause of action appear to arise *ex turpi causâ* or a transgres-

sion of a positive law, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of Defendant, but because they will not lend their aid to such a Plaintiff." There is not in this case the *par delictum* between the parties which was the gist of the case of *Holman* vs. *Johnson*, but, as observed by Lord Ellenborough, in a somewhat similar case to the present, " Oppression on one side and submission on the other: it can never be predicated as *par delictum* when one holds the rod and the other bows to it." *Smith* vs. *Guff*, 6 M. and S., 160. Under all these circumstances, the action is dismissed."

JUDGMENT: " Considering that, at the time of the making and delivering, by Defendant to Plaintiffs, of the note for which this action was brought, Defendant was insolvent and in course of effecting an agreement of composition with his creditors, amongst whom were Plaintiffs, the whole with Plaintiffs' knowledge, which said agreement of composition was shortly afterwards carried into effect and completed, at and after the rate of ten shillings in the pound, upon the respective amounts, as set out in the schedule to the composition annexed, and which said composition was executed by Plaintiffs, whereby Plaintiffs, and the creditors, agreed to settle with him for the composition of ten shillings in the pound, on their respective claims, and which claim of Plaintiffs was by them in the schedule set down at two hundred and twenty-five pounds five shillings and ten pence; and, considering that the amount of said note and of the alleged demand of Plaintiffs, in consideration whereof the said note was given, were not included in the said sum upon which the composition was effected with Defendant, and that the withholding thereof from the knowledge of the other creditors agreeing to the composition, and the taking of the note from Defendant, was fraudulent in law, as and by Plaintiffs, doth dismiss this action." (3 *J.*, p. 240.)

R. and G. LAFLAMME, for Plaintiffs.

DOUTRE et DAOUST, for Defendant.

COMPOSITION WITH CREDITORS.—FRAUD.

COURT OF QUEEN'S BENCH, Montreal, 1st June, 1860.

Coram Sir L. H. LAFONTAINE, Baronet, Chief - Justice AYLWIN, J., DUVAL, J., C. MONDELET, J.

JOHN GREENSHIELDS et al., Plaintiffs in the court below, Appellants; *and* LOUIS PLAMONDON, Defendant in the court below, Respondent.

Held: That promissory note made by Respondent, by virtue of an agreement between Appellants and Respondent, at the special instance and request of Respondent, and for his benefit and advantage, to facilitate a final settlement then proposed between Respondent and his creditors, where such agreement is not prejudicial to the creditors, and they have not complained, and where Respondent has frequently, since the final settlement between him and his creditors, acknowledged the amount of the note to be owning, and promised to pay the same to Appellants, is binding on the maker of the note.

The facts of this case, and the pretensions of the parties and the judgment of the court below, are reported *supra* p. 484.

In appeal, LAFLAMME, for Appellants, argued that the judgment was erroneous; that, in the whole transaction relating to the note, and, subsequently, there had been no fraud on the part of Appellants, and no injury to the creditors. The Appellants had not received any more than the other creditors, and had no fraudulent preference. If they obtained judgment for the amount of this note, they would still receive less than the others, who had received 10s. in the £. The Appellants alone, on the claim which they had against Respondent for his guarantee of Derosiers' debt, amounting to £261 2s., received by the note £100, which was much less. Having made the composition for this claim, he subsequently settled the other claim of Appellants for 10s. in the £. In this transaction, there was certainly no fraud or prejudice to other creditors. Even, supposing that the composition should have reference to this particular claim of Appellants, settled by common agreement between the parties, independent of the composition, it was, at all events, well established; and the judgment itself admits that this amount was not included in the composition, and for the reason that Respondent required it. The Appellants, nevertheless, had a lawful claim against him. Should it be that the omission of this claim in the statement should involve the absolute forfeiture of all right for the creditor, and procure a complete discharge to the debtor? There was no law to justify such a pretension. The most that could be contended for, in such a case, would be that the claim should be reduced to the composition upon other claims, and that the creditor should only receive 10s. in the £ like others.

Even, in this point of view, the most favourable for Respondent, Appellants were entitled to a judgment for £50.

DOUTRE, for Respondent. The facts on both sides are proved, saved and except the pretension of Appellants, that Respondent was, at any time, the *garant* of Desrosiers. On the contrary Appellants had no lien or right of action against Respondent for the debt of Desrosiers when Respondent asked them to sign his composition ; and, it is evident that the note in question was only given to Appellants in order to give them a preference over the other creditors, and induce Appellants to sign the composition. The legal question submitted in this cause was free from all ambiguity, and could be stated in the following terms : " Can a note given by an insolvent " debtor to a creditor, in view of a deed of composition, as an " exceptional advantage for this creditor, without the know- " ledge of other creditors, be enforced in a court of justice ?" The court below decided in the negative supported by the most formal authorities of the english and french law.

DUVAL, Justice : The judgment must be reversed ; Appellants compounded for their own debt, but it was expressly agreed that a previous note which was a claim against a third party and indorsed by Defendants should be paid to the extend of £100. The evidence shewed good faith on the part of Appellants, and none of the creditors had complained of the arrangement. The Respondent had frequently promised to pay the note.

MONDELET, J. : L'action en cour de première instance, avait pour objet le recouvrement de la somme de £100, montant d'un billet promissoire souscrit par le Défendeur le 11 décembre 1854, payable à 20 mois. Les faits sont ceux-ci : Plamondon, étant en banqueroute, fit un arrangement avec ses créanciers, à raison de dix chelins dans le £. Les Greenshields ayant une réclamation contre Desrosiers ne consentirent, envers Plamondon, à signer l'acte de composition qu'à la condition que Plamondon se chargerait envers eux de la dette de Desrosiers, ce que fit Plamondon, qui consentit le billet dont il est maintenant question. Les créanciers payés, il s'agit maintenant de savoir : 1° s'il est libre à Plamondon de payer ce billet, et si, en le payant, il fraude des créanciers ; 2° peut-il, à l'heure qu'il est, exciper du droit de ses autres créanciers, attaquer ce billet comme fait en fraude de ses créanciers, et refuser de les payer ? D'un côté, l'on peut dire qu'il a agi en fraude de ses créanciers, qu'il a tenu dans l'ignorance du motif de la transaction qu'il a ainsi faite avec les Greenshields, qui refusaient de signer l'acte de composition à moins que Plamondon ne souscrivît le billet de £100 en leur faveur. On pourrait peut-être ajouter que Plamondon souscrivant un billet de £100, en

faveur des Greenshields, songeait probablement, dès lors, aux moyens de rencontrer ce billet. D'un autre côté, quelle est la loi qui frappe de nullité une telle transaction ? Le nouveau droit fronde ces transactions, mais quant au droit ancien ? Il n'y a aucune prohibition. J'opine donc pour l'infirmation du jugement.

JUDGMENT IN APPEAL: "The court, considering that the promissory note signed by Respondent, in favour of Appellant, on the eleventh day of December, 1854, and for the recovery of the sum specified wherein this action is brought, was so made and signed, in virtue of an agreement entered between Appellants and Respondent, at the special instance and request of Respondent, and for his benefit and advantage, to facilitate a final settlement then proposed between Respondent and his creditors ; considering that such an agreement was not prejudicial to the interest of the creditors, and that the creditors have not complained thereof ; considering, finally, that Respondent, since the final settlement between him and his creditors, has acknowledged the amount of the said note to be still due and owing to Appellants, and promised to pay the same ; and that, by reason of the facts above mentioned, fully established by the evidence adduced, the agreement so entered between Appellants and Respondent was valid and binding on Respondent, who is now justly indebted unto Appellants in the amount specified in the note, doth reverse and annul the judgment rendered by the Superior Court, sitting at Montreal, on the thirty-first day of May, 1859 ; and this court, proceeding to pronounce the judgment which the Superior Court ought to have pronounced, doth condemn Respondent, Defendant in the court below, to pay to Appellants, the sum of one hundred pounds, with interest from the 14th day of August, 1856. AYLWIN, J., dissenting." (8 *J.*, p. 192, et 10 *D. T, B. C.*, p. 251.)

LAFLAMME, LAFLAMME and BARNARD, for the Appellants.

DOUTRE and DAOUST, for the Respondent.

LETTRE DE GARANTIE.—DISCUSSION.

COUR SUPÉRIEURE, Montréal, 31 mai 1859.

Coram BADGLEY, J.

ROLLAND et al. *vs.* LORANGER.

Jugé : 1° Qu'une lettre de garantie donnée à l'un des membres d'une société de commerce, confère un droit d'action à cette société.

2° Que la caution n'est pas tenue de payer les frais de la discussion du débiteur principal.

Par leur déclaration, les Demandeurs alléguaient : " que, le 12 juillet 1851, le Défendeur s'obligea envers Gabriel Lenoir dit Rolland, un des Demandeurs, alors en société avec l'autre Demandeur, et faisant commerce ensemble, en la cité de Montréal, sous la raison sociale de " Rolland et Lapierre," et ce longtemps auparavant, à payer le cuir que Pierre Chrysologue Dugal, là et alors de la dite cité, cordonnier, prendrait ce jour-là chez Lenoir dit Rolland, savoir, au magasin des Demandeurs, et ce, au montant de $60, si Dugal ne payait point au temps de l'échéance du délai que Lenoir dit Rolland, devait lui donner, tel que le tout appert à l'écrit alors dressé par le Défendeur et par lui signé et remis à Dugal, qui le remit à Lenoir dit Rolland (1) ; que, sur la foi du dit écrit, et sur le cautionnement ainsi donné par le Défendeur, les Demandeurs, alors associés comme susdit, ont avancé et vendu, et livré, là et alors, à Dugal, du cuir au montant de £16 3s. 9½d., et que, sans le dit écrit, ils n'auraient jamais avancé ni livré ce cuir à Dugal qui était alors notoirement insolvable et en déconfiture ; que le Défendeur connaissant bien tout ce que ci-dessus, a, néanmoins, toujours négligé et refusé de payer aux Demandeurs, quoique de ce souvent requis, la somme de $60, montant de son cautionnement, en autant que Dugal n'a jamais payé le cuir, ainsi à lui là alors vendu et livré par les Demandeurs, là et alors associés, et a laissé poursuivre Dugal par les Demandeurs, pour le paiement du cuir, et a laissé faire des frais considérables pour parvenir à la discussion de Dugal, et ce, à sa pleine connaissance ; que Dugal a été discuté suivant la loi, pour établir son insolvabilité, et ce à la réquisition même du Défendeur qui a toujours promis de payer le montant de son cautionnement aussitôt l'insolvabilité de Dugal constatée, mais a toujours néanmoins négligé de ce faire ; que les frais taxés sur le jugement sont de £4 9s. 9d., et les frais subséquents encourus sur l'émanation des writs de saisie-exécution contre les biens-meubles de Dugal et la mise en force d'iceux sont de £2 11s. 8d., formant en tout la somme de £7 1s. 5d., qui jointe à £15 forme £22 1s. 5d. Le Défendeur ayant plaidé par une défense en fait et ayant été examiné sur faits et articles, au 11e interrogatoire qui est comme suit : " 11e. N'est-il pas vrai que Dugal qui n'a jamais payé le prix du cuir ainsi vendu et livré par les Demandeurs a été poursuivi par eux pour le susdit montant, à votre demande et réquisition ?" Il a répondu ainsi : " Il est vrai qu'il a été poursuivi, ayant

(1) Cet écrit était rédigé comme suit : " Montréal, 12 juillet 1851. Je m'oblige envers M. Rolland à lui payer le cuir que M. Dugal prendra ce jour chez lui, jusqu'au montant de soixante piastres ; si M. Dugal ne le paie point au temps de l'*échéance* du délai que M. Rolland doit lui donner." (Signé) T. J. J. Loranger.

été menacé moi-même de poursuite, j'ai dit aux avocats des Demandeurs que, si j'étais poursuivi, j'invoquerais une exceptien de discussion, et je crois que c'est sur ma réponse qu'il a été poursuivi." Au 12e interrogatoire qui est comme suit: " N'est-il pas vrai que, depuis le 12 et le 14 juillet 1851, Dugal a été poursuivi par les Demandeurs, *et ce, à votre réquisition*, et qu'il a été discuté suivant la loi, et que son insolvabilité a été constatée ?" Le Défendeur répondit: " Cela est vrai." Il fut prouvé que Gabriel Lenoir dit Rolland ne faisait point de commerce séparé de celui de leur société à la date de la lettre de garantie.

LAFRENAYE, pour les Demandeurs, cita les autorités suivantes pour établir que cette lettre de garantie, quoique adressée à un seul des associés donnait à la société commerciale de Rolland et Lapierre un droit d'action en recouvrement. Smith's Mercantile Law, p. 68 ; 4 B. et C., 664 ; 3 C. et P., 162 ; 2 Camp., 548.

LORANGER, pour le Défendeur, prétendit qu'il pouvait avoir une compensation à opposer à cette réclamation, si elle eût été faite au nom de Rolland seul, et que, conséquemment, la demande faite au nom d'une société avec laquelle il n'avait pas contracté le privait de ce droit.

PER CURIAM : Quand la lettre de garantie fut accordée, la société Rolland et Lapierre existait, et Rolland ne faisait pas commerce séparé. Les effets étaient demandés au magasin de la société, leur livraison était là, et ils étaient entrés dans leurs comptes. Une telle garantie ne doit être interprétée strictement, mais, d'après ce qui paraît généralement être l'intention des parties, et, même dans l'absence d'une preuve positive sur ce point, l'interprétation doit être prise fortement contre le donneur de la lettre. La cour a condamné le Défendeur à payer le montant du cautionnement, et a refusé d'accorder les frais de la discussion de Dugal, et le jugement est motivé comme suit : " The court considering that the guarantee given by Defendant, in favor of Gabriel Lenoir dit Rolland, one of the said firm existing at the time when the said guarantee was carried into effect and accepted, inured to the benefit of Plaintiffs, copartners aforesaid, said Lenoir dit Rolland also then and there not engaged in trade separately, condemn Defendant to pay to Plaintiffs, the sum of £15, amount of said guarantee, with interest thereon from the 29th day of January, 1856, until actual payment." (3 *J.*, p. 249.)

LAFRENAYE et PAPIN, Avocats des Demandeurs.

POMINVILLE, Avocat du Défendeur.

ABSENTEE DEFENDANTS.—JURISDICTION.

SUPERIOR COURT, Montreal, 30th June, 1859.

Coram BERTHELOT, J.

FROTHINGHAM et al. *vs.* THE BROCKVILLE AND OTTAWA RAILWAY COMPANY, *and* DICKINSON et al., GARNISHEES.

Held : That absent Defendants who have had no domicile in Lower Canada, must possess real or personal property within the district where the suit is instituted to give jurisdiction to the court, and that property of the Defendants within the district of Québec, held by a resident within the district of Montreal, is not property of the Defendants within the district of Montreal.

This was a saisie-arrêt before judgment sued out by Plaintiffs against Defendants, who were a foreign corporation, upon a judgment rendered against them in Upper Canada. The action was instituted, under authority of the 94th clause of the Judicature Act of 1849, which permits of persons who have no domicile in Lower Canada, but who have personal or real estate within the same, being impleaded in the Superior or Circuit Court, in the district or circuit, where such property may be situated. The writ was served in Upper Canada upon Defendants, at their domicile, in Upper Canada, under the provisions of the 58th section of the Act amending the Judicature Act 22nd Vic., chap. 5. Defendants appeared and fyled a declinatory exception, and an exception *à la forme*, whereby they represented, that they had no domicile in Lower Canada, that the *debt* sued for, was not contracted in Lower Canada, and that they had no personal or real property in Lower Canada. It appeared, in evidence, that, though Defendants had no property in the district of Montreal, yet they had personal property in the district of Quebec, which however was in the custody of the agent here of the Tiers-Saisi Dickinson, and that Dickinson resided in the district of Montreal. It was claimed by Plaintiffs that the residence of Dickinson within the district of Montreal, and the holding by him of property of Defendants, though it was situate in the district of Quebec, gave jurisdiction to the court. After hearing, the court maintained the exceptions, and dismissed the action. (3 *J.*, p. 252.)

ABBOTT and BAKER, for Plaintiffs.

TORRANCE and MORRIS, for Defendants.

INTERVENTION.

SUPERIOR COURT, Montreal, 30th June, 1859.

Coram BERTHELOT, J.

BEAUDRY *vs.* LAFLAMME, and DAVIS, Intervening Party.

Held: That an Intervening Party, whose intervention has been allowed, is entitled to plead to the merits of the action in order to the conservation of his rights, and this though another and separate issue is raised on the intervention by the Plaintiff pleading thereto.

This was an action of revendication instituted by Plaintiff to recover four horses which he alleged to be his property. The Intervening Party, by his intervention, claimed that he had purchased the horses of Defendant in good faith, alleging further that the horses were seized in his possession and not in Defendant's, and, in order to protect his rights, he filed an intervention which was allowed by the court. Plaintiff filed answers to the intervention. The Intervening Party replied to these, but in addition thereto, he pleaded several pleas to the *demande* of Plaintiff. Plaintiff then moved to reject the pleas of the Intervening Party to the action, on the ground that he was not entitled to plead to the action, or do more than join issue on the intervention. The motion was dismissed. (3 *J.*, p. 253.)

E. CARTER, for Plaintiff.

TORRANCE and MORRIS, for Intervening Party.

SOCIETE, PREUVE, FACTEUR. VENTE.

COUR SUPÉRIEURE, Montréal, 31 mars 1861.

Coram SMITH, J.

BEAUDRY *vs.* LAFLAMME, et DAVIS, Intervenant.

Jugé: 1° Qu'une société de commerce doit être prouvée par écrit et non par témoins quant aux associés entre eux.

2° Que les ventes de facteurs doivent, même sous le statut 10 et 11 Vict., ch. 10, être faites suivant le cours ordinaire de leur commerce.

3° Que les ventes des facteurs doivent être faites argent comptant, si l'usage de leur commerce ne justifie pas leur crédit.

Le Demandeur alléguait que, le 4 avril 1859, à Montréal, il était propriétaire et en possession de quatre chevaux et que, là et alors, le Défendeur, dans le but d'en disposer, sans son consentement ni autorité, les avaient enlevés illégalement. Le Défendeur plaida qu'il était commerçant de chevaux en société avec le Demandeur, retirant la moitié des profits et supportant la moitié des pertes; que ces chevaux appartenaient à la

société, et qu'après en avoir vendu plusieurs autres, il avait vendu ceux-là à Augustus G. Davis, pour la somme de $575. Puis intervient Davis, et prenant faite et cause avec le Défendeur, il réclama la propriété des chevaux saisis, avançant qu'il les avait achetés du Défendeur, le 4 avril 1859, pour $575, dont $475 avaient été payées, laissant une balance de $100 encore due; qu'il en avait obtenu la livraison et que, lors de la saisie, le 5 avril, il en était en possession; qu'il les avait achetés à marché ouvert de bonne foi, et enfin que le Défendeur était un commerçant de chevaux et que les chevaux en question lui avaient été livrés et consignés pour être vendus au compte du Demandeur. Puis il invoque le statut des facteurs, 10 et 11 Vic., ch. 10. Par un autre plaidoyer, il soutint de plus que le Défendeur était l'associé du Demandeur pour le commerce de chevaux; que ces quatre chevaux saisis appartenaient à la société, et que c'est pendant que cette société durait qu'il avait ainsi transigé de bonne foi avec le Défendeur. A ces différentes défenses, le Demandeur répondit que le Défendeur n'était pas commerçant de chevaux, ni son agent, aux termes du statut des facteurs; mais qu'au contraire il n'était que son serviteur et homme de cour, chargé du soin de ses chevaux; que, si aucune vente avait eu lieu, elle était irrégulière et nulle.

A l'audition, M. GIROUARD, pour le Demandeur, dit qu'en jetant un coup d'œil sur les dispositions de la loi des facteurs, l'Intervenant ne pouvait prétendre aucun droit de propriété sur les chevaux saisis; que, dans l'espèce, il s'agissait d'un agent fondé sur un pouvoir général que lui confère le commerce particulier auquel il se livre publiquement et à l'exclusion de tout autre commerce ou besogne; que cet argent, suivant la doctrine des auteurs, et français et anglais, oblige son principal par tous les contrats et actes qu'il fait avec des tiers de bonne foi, dans le cours ordinaire de son commerce: que le facteur est un agent de cette classe; que, comme tel, il a la possession des marchandises qui lui sont confiées pour être vendues; qu'aux yeux du public, il a toute la couleur et l'apparence de propriétaire et que, pour cette raison, il peut en disposer en son propre nom; mais que, cependant, de droit commun, le facteur ne peut pas disposer des marchandises qui lui ont été consignées autrement que suivant le cours ordinaire du commerce, et que tous ses actes, non justifiables par la coutume générale des facteurs, sont irréguliers et nuls; qu'en conséquence, de droit commun encore, les ventes des facteurs doivent être pour argent comptant, à moins que l'usage de leur commerce justifie le crédit et que tel usage soit prouvé (Story, on Agency, p. 122, § 110, p. 77, § 60; Dunlop's Paley, p. 27, à la note); que les lois statutaires introduites en Angle-

terre et adoptées par notre législature canadienne, n'ont apporté aucun changement à ces règles du droit commun sur la qualité des facteurs et leur mode de vendre et de disposer des effets de leurs commettants (Dunlop's Paley, on Agency, p. 224.) ; que l'Intervenant ne se présentait pas dans les circonstances prévues par la loi et qu'il ne pouvait invoquer ni le statut des facteurs, ni la prétendue société ; que la preuve faite par le Demandeur montrait clairement : 1° qu'il a acheté les chevaux en question aux Etats-Unis, et que la propriété ne pouvait pas lui être disputée ; 2° qu'il a payé pour le transport et le fret des chevaux ; 3° qu'il en a été en possession depuis le jour qu'il les a achetés, depuis le commencement de février 1859 jusqu'au 4 avril suivant ; 4° que, durant ce temps-là, Laflamme n'était que l'engagé et l'homme de cour du Demandeur, chargé uniquement du soin de ses chevaux ; 5° qu'il était reconnu et pris comme tel devant le public, et non pas commerçant de chevaux ; 6° qu'il l'avait lui-même avoué et confessé à plusieurs personnes ; 7° que, durant ce même temps, le Demandeur pourvoyait à la nourriture des chevaux ; qu'il achetait lui-même le foin, l'avoine et autres choses nécessaires à leur entretien et que, lorsque le Défendeur les achetait, c'était toujours avec l'argent du Demandeur et comme son engagé ; 8° que la vente avait été irrégulière et incomplète, en autant qu'elle n'avait pas été suivie d'aucune livraison ; 9° qu'une partie considérable du prix de vente, $275, avait été payée après que les huissiers chargés de la saisie fussent sur les lieux et après la saisie ; 10° qu'un crédit avait été donné à l'Intervenant, et que ce dernier reconnaît lui-même dans son intervention devoir encore la somme de $100 ; 11° que le Défendeur et l'Intervenant étaient de mauvaise foi et agissaient de concert, dans le but de frauder le Demandeur de sa propriété, et que, plus particulièrement, Davis savait, lors et avant la vente, que les chevaux appartenaient à Beaudry et que Laflamme n'avait pas le droit de les vendre.

TORRANCE, pour l'Intervenant, soutint au contraire que la preuve faite faisait suffisamment voir que Laflamme avait été et était encore, durant l'hiver de 1859, commerçant de chevaux ; qu'il tenait des écuries comme tel dans la grande rue Saint-Laurent, écuries connues sous le nom de " Écuries de Berland " ; qu'il avait loué des écuries, et qu'il y tenait différents chevaux, et entre autres ceux saisis en cette cause ; qu'il payait lui-même pour leur entretien et nourriture, tel que foin, avoine, son et ferrage, etc. ; qu'il les sortait souvent et les amenait sur le marché des chevaux, dans la rue Saint-Henri, où il les offrait en vente à différents acheteurs ; qu'il a vendu, durant l'hiver de 1859, quatre chevaux, un à un nommé Morris et un autre à un nommé Vanhorn, et deux autres à

l'Intervenant; que le Demandeur a approuvé la vente des chevaux en question par sa remarque à Clarke " That's a nice pair of horses Laflamme has there " ; et que Laflamme avait même vendu ces chevaux dans les écuries de Berland ; que les chevaux saisis ont été vendus dans ces mêmes écuries, le 5 avril 1859, à marché ouvert et de bonne foi, qu'il en avait payé le prix et qu'ils lui avaient été livrés le même jour chez Henry Irish ; qu'enfin, le jour où il était allé acheter les chevaux en question, il a vu différents commerçants de chevaux les marchander, et qu'aux yeux du public Laflamme passait pour en être le propriétaire, ayant pouvoir de les vendre.

CASSIDY pour le Défendeur, soutint que la preuve de société était complète ; que le Défendeur avait fait le commerce de chevaux avec le Demandeur et qu'ils ont acheté les chevaux en question ensemble ; qu'il a payé pour le fret des chevaux et leur entretien, et qu'enfin le Demandeur lui-même avait reconnu qu'il était en société avec le Défendeur pour le commerce de chevaux ; qu'il était vrai que le Demandeur avait payé pour ces chevaux ; mais que le Défendeur mettait ses services dans la société et qu'en un mot c'était rien autre chose qu'une société en commandite, laquelle société peut se prouver par témoin.

CARTER, en réplique, dit que les écuries de Berland, dont le Demandeur était propriétaire et qu'il avait louées à un nommé Berland avaient été sous-louées par ce dernier au Demandeur, qu'il en payait le loyer et qu'il possédait un reçu à cet effet ; que les deux chevaux vendus par Laflamme, durant l'hiver de 1859, appartenaient au Demandeur, mais qu'il les avait vendus au Défendeur comme étant trop incommodes ; que, quant au cheval vendu à Vanhorn, il appartenait aussi au Demandeur, et avait été vendu avec les quatre cheveaux saisis en cette cause, et que le Demandeur n'avait pu le retrouver ; que, quand le Défendeur sortait les chevaux, c'était pour les exercer, comme l'engagé du Demandeur ; que la preuve de société était insuffisante, en autant qu'elle n'était pas par écrit et ne définissait pas les parts des profits et pertes ; qu'enfin soit que le Défendeur fût associé, soit qu'il fût simplement agent, l'Intervenant aurait dû offrir avec sa demande en intervention la balance du prix, $100, et ne pas vouloir retenir ainsi et les chevaux et une partie du prix de vente.

SMITH, J. : Les seules questions qui sont soulevées dans cette cause sont : 1° le Défendeur était-il l'associé du Demandeur dans le commerce de chevaux ? 2° ou bien était-il l'agent du Demandeur, de manière à autoriser l'Intervenant à les acheter de lui ? La question de société doit être considérée sous deux faces différentes, suivant qu'il s'agit du Défendeur ou de l'Intervenant. Par rapport au premier, aucune preuve légale de

société n'a été faite ; car, c'est un principe certain de droit que les associés ne peuvent pas entre eux prouver leur société autrement que par écrit ; et aucun acte ou écrit de société n'est allégué dans les plaidoyers, ni produit dans la cause. En conséquence, les défenses du Défendeur doivent être déboutées. Quant à l'Intervenant, il est dans la position d'un tiers et il peut comme tel prouver cette société par témoins. Maintenant donc, Davis a-t-il fait aucune preuve verbale de société entre Beaudry et Laflamme ? Il n'y a rien dans la preuve sur ce point, si ce n'est les aveux du Défendeur, qui répétait à tout le monde qu'il était l'associé de Beaudry ; mais ce n'est pas sur ces aveux du Défendeur que la cour peut s'appuyer. Voici les faits : Le Demandeur, qui est un riche propriétaire de cette ville, ayant besoin de plusieurs chevaux, partit pour les Etats-Unis, accompagné du Défendeur. Rien n'était plus naturel, puisque Laflamme, comme connaisseur de chevaux, ne pouvait que lui être utile dans ses achats. C'est en effet Beaudry qui achète les chevaux avec d'autres animaux ; c'est lui qui en paie le prix, le fret et tout le coût du transport ; mais comme aurait fait tout serviteur, c'est le Défendeur qui mène et a le soin des chevaux pendant le trajet à Montréal, tandis que le Demandeur revient à Montréal par terre dans sa voiture privée ; les chevaux sont conduits aux écuries du Demandeur, entre la rue St-Dominique et la rue Faubourg St-Laurent, où ils ont été tenus jusqu'au temps de la vente, la veille de la saisie ; et c'est là que le Défendeur les soignait. Pendant tout cet intervalle, c'est le Demandeur qui pourvoit à la nourriture des chevaux ; c'est lui qui achète le foin et l'avoine et les autres choses nécessaires à leur entretien ; en un mot le plaidoyer de société de l'Intervenant doit être renvoyé. Maintenant Laflamme était-il l'agent du Demandeur de manière à autoriser Davis à transiger avec lui ? Il ne paraît pas que Laflamme fut le facteur de Beaudry, jouissant de la possession des chevaux et du pouvoir de les vendre. Au contraire, il est établi par plusieurs témoins que le Défendeur n'était que le serviteur et l'homme de cour du Demandeur, chargé du soin de ses chevaux et il le disait lui-même. Il est vrai que, pendant ce temps-là, Laflamme sortait les chevaux et les exposait en vente sur la place publique ; mais il n'y a rien dans ces faits qui indique que Beaudry ait voulu un seul instant se départir de la possession de ses chevaux, et l'on n'a pas même montré que ces choses se passaient à sa connaissance. D'ailleurs, dans quelles circonstances la vente a-t-elle eu lieu ? Davis, accompagné du frère du Défendeur, se rend aux écuries de Berland, et sans s'informer aucunement sur la qualité de Laflamme, sans s'assurer de l'étendue de ses pouvoirs, marchande les chevaux et complète ensuite le marché dans la barre de Irish pour $575 ; et cela, même après avoir entendu,

de la bouche même du Défendeur, du moins c'est ce que rapporte le témoin Paquette, que ces chevaux ne lui appartenaient pas, qu'ils appartenaient à Beaudry, et que pour les acheter il fallait aller le voir. Il paie le soir même $275, et le lendemain matin paie encore $275. Mais c'est après que les huissiers fussent sur les lieux de leur exécution, que ce dernier paiement a été fait, alors que l'Intervenant était aussi ouvertement averti du défaut d'autorisation du Défendeur. Je dois avouer, cependant, qu'il y a des contradictions dans la preuve, et je dois m'arrêter à un autre point admis par toutes les parties et qui doit décider en faveur du Demandeur. Un crédit de $100 à été donné à l'Intervenant : ce fait n'est pas contesté, mais est confessé. Or c'est une règle de droit que les ventes d'agent, ayant la possession de marchandises qui leur sont confiées pour être vendues, ne doivent pas être faites à crédit ; mais qu'au contraire, dans tous les cas, ces ventes doivent être argent comptant, à moins que l'usage de leur commerce ne justifie le contraire ; et non seulement on n'a apporté aucune preuve de coutume ou usage à cet effet, mais même le Demandeur a prouvé que les commerçants de chevaux, pour le compte des autres, vendaient toujours argent comptant. Enfin la balance de $100 aurait dû être offerte avec l'intervention. Jugement pour le Demandeur. (6 *J.*, p. 134.)

CARTER et GIROUARD, pour le Demandeur.

LEBLANC et CASSIDY, pour le Défendeur.

TORRANCE et MORRIS, pour l'Intervenant.

SALE.—AGENT.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 2nd December, 1861.

Coram Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

AUGUSTUS G. DAVIS (Intervening Party in the court below), Appellant, and FRANÇOIS-Xavier BEAUDRY (Plaintiff in the court below), Respondent.

Held : That, if an attachment be issued to seize property in the hands of A, and, under the writ, the sheriff attaches property in the hands of B, seizure is null.

That an agent (a horse dealer), in possession of horses, gives a good title to a purchaser in good faith as against his principal, the proprietor, under the consolidated Statutes of Canada, ch. 59.

This was an appeal from a judgment (reported *supra*, p. 501) maintaining the pretensions of Respondent to be regarded as

the owner of certain horses, which Appellant had purchased from Defendant.

The principal issue raised in the case was whether Laflamme had, either as partner, servant, or agent of Respondent, authority to sell the horses in question to Appellant, or whether Respondent was bound by the acts of Laflamme. In order to arrive at a solution of the question, it will be necessary to refer to certain point established by the testimony of Appellant. A preliminary legal point, however, presented itself, and Appellant submitted that the judgment must be reversed, inasmuch as the seizure was null, *propter defectum auctoritatis.* The seizure was directed against Laflamme to seize horses in his possession, but the horses seized were in the possession of Appellant when seized, having been delivered to him by Laflamme. The elementary principle that the action of revendication ought to be directed against the possessor of the thing (Guyot, *Revendication*, p. 619) had been affirmed by the old Court of Queen's Bench, which held " that, if an attachment be issued to seize property in the hands of A, and under the writ, the sheriff attaches property in the hands of B, the seizure is null, and the court will restore the property to B, without inquiring into his right to it. (*Lee* vs. *Taylor*, 1 *R. J. R. Q.*, p. 399.) On this ground, then, Appellant *in limine* contended that he was entitled to a reversal of the judgment, and a restoration of his property.

PER CURIAM: The court, seeing that, on the sixth day of April, 1859, when, under the process of revendication sued out by Respondent, the attachment of the four brown mares in question in this cause was effected, the same were not in the custody, power or possession of François *alias* Francis Laflamme, trader, Defendant in the cause against whom Respondent brought suit.

Seeing that, on the day previous, to wit, the fifth day of April, 1859, the four brown mares had been sold to Appellant by Laflamme and delivered, and had been removed, from the stables of Laflamme, where previously they had been kept and stabled, by Appellant, to the stable of Henry Irish, where they were in livery and keeping, at the costs and expense of Appellant, as being his property and in his actual possession.

Seeing that Laflamme had, long before the sale by him made to Appellant, been entrusted by Respondent with the custody and possession of the mares, and that Laflamme was his agent and was authorized to offer them for sale and to make sale thereof.

Seeing that Appellant purchased the same in good faith from Laflamme, who was well known to be a dealer in horses, and accustomed to buy and sell them.

Seeing that Appellant paid to Laflamme the price of horses in good faith, that is to say, in money, at the time of the sale, the sum of four hundred and seventy-five dollars, and that Laflamme, by reason of the transaction having been completed after banking hours, consented to wait till the next day for the payment of the sum of one hundred dollars remaining due upon the price, to wit, the sum of five hundred and seventy-five dollars. Seeing that, under the provisions of the statute 10 and 11 Vict., ch. 10, consolidated statutes of Canada, ch. 59, Respondent was bound by the sale so made by his agent and factor, Laflamme, and Appellant in making such purchase was and is fully protected.

Seeing Appellant hath fully established in evidence the allegations contained in his intervention, and that Respondent hath wholly failed to make proof of his contestation thereof, and to show that Laflamme was a mere groom, hostler or stable servant, and not an agent authorized to sell.

Seeing, therefore, that, in the award of judgment in favor of Respondent, as Plaintiff in revendication, of the four brown mares, and the dismissal of Appellant's intervention, in the court below, there is error; it is considered and adjudged that the judgment rendered in the Superior Court, at Montreal, on the 30th day March last, be, and it is hereby reversed, annulled and set aside, and, proceeding to render the judgment which the court below ought to have given, it is considered and adjudged that the attachment effected of the four brown mares, be and the same hereby is set aside and vacated, the contestation and plea of Respondent, to the intervention of Appellant, is overruled and dismissed and *mainlevée* of the attachment granted in favor of Appellant, Respondent is further condemned to restore and deliver up the mares to Appellant, within three days from the service upon him of a copy of the present judgment. *Dissentiente* the Hon. Sir LOUIS HIPPOLYTE LAFONTAINE, Baronet, Chief Justice. (6 *J.*, p. 163.)

TORRANCE and MORRIS, for Appellant.

CARTER and GIROUARD, for Respondent.

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" DE CREANCES:—*Vide* NOVATION.
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